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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

KEITH ROBINSON AND J. STUART FERGUSON,

Petitioners,

v.

JAMES BRUNING,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March, 1992.

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QUESTIONS PRESENTED

1. Did police officers violate a rape suspect's clearly established rights under the Fourth and Fourteenth Amendments, when the officers omitted information which might affect the credibility of the rape victim's identification of the suspect from applications for an order for nontestimonial identification and a warrant for arrest?

2. When police officers assert their qualified immunity in defending a civil action brought by a rape suspect under 42 U.S.C. § 1983, are the officers required to bear the burden of trial on the merits in order to have their claim of qualified immunity determined?

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No. _____

In The

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KEITH ROBINSON AND J. STUART FERGUSON,

Petitioners,

v.

JAMES BRUNING,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Keith Robinson and J. Stuart Ferguson petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 949 F.2d 352. The order of the district court (App., *infra*, 19a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991. The petition for rehearing was denied December 13, 1991. (App., *infra*, 36a-37a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS AND STATE PROCEDURAL RULE INVOLVED

The Fourth Amendment provides, in pertinent part, as follows:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons or things to be seized.

The Fourteenth Amendment provides, in pertinent part, as follows:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 41.1 of the Colorado Rules of Criminal Procedure provides, in pertinent part, as follows:

> (a) A non-testimonial identification order . . . may be issued by any judge of the Supreme, District, Superior, County Court or Court of Appeals.
>
> * * *
>
> (c) An order shall issue only on an affidavit or affidavits sworn to or affirmed before the judge and establishing the following grounds for the order:
>
> > (1) That there is probable cause to believe that an offense has been committed;
> >
> > (2) That there are reasonable grounds not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and
> >
> > (3) That the results of specific non-testimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

STATEMENT OF THE CASE

Petitioners Keith Robinson and J. Stuart Ferguson, officers of the Gunnison, Colorado, Police Department, are the sole remaining defendants in an action brought by

James Bruning in the United States District Court for the District of Colorado, seeking damages under 42 U.S.C. § 1983 and state tort law. The district court dismissed all claims, both under § 1983 and state tort law, against the eight other named defendants, and all state tort law claims against the petitioners on motions for summary judgment.

Bruning claims that Robinson and Ferguson violated his rights under the Fourth and Fourteenth Amendments in October, 1986, when they submitted false affidavits to the county court to obtain an order requiring him to undergo nontestimonial identification procedures pursuant to Rule 41.1, Colo.R.Crim.P., and a warrant for his arrest on sexual assault charges arising from two rapes committed in June and September, 1986. After a preliminary hearing, the county court dismissed the charges which had been filed by the district attorney.

Bruning admits that the rapes occurred, and that the police officers' affidavits, on their faces, established probable cause for the issuance of the order and warrant. He challenges the veracity of the affidavits, claiming that the officers should not have believed the victim of the first rape when she identified him as the rapist. He also asserts that information material to the credibility of his identification by the victim wrongfully was omitted from the affidavits.

Robinson and Ferguson sought summary judgment based on qualified immunity, *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986), showing that Bruning admitted having no evidence to support a critical element of his case: the intentional falsehood or reckless disregard with

which challenged portions of the affidavits were included or omitted by each police officer. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). The officers argued that Bruning's failure to sustain his burden as to this element was fatal to his case, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and rendered all other issues immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).[1]

The district court determined the state tort law claims on the same facts, finding that since "the plaintiff has not shown that [the defendants'] acts or omissions were willful and wanton" (App., *infra*, 34a), Bruning had no evidence with which to overcome the officers' qualified immunity under state law. The district court denied the officers' qualified immunity from the § 1983 claim, however, stating,

> Neither jurors nor judges should be able to set standards of objective reasonableness where special knowledge, experience and training are involved in the defendant's conduct. Thus, the ultimate fact to be found is whether a reasonably competent police officer in the position of the defendants Robinson and Ferguson would have submitted these affidavits to the court in the belief that they were accurate and that they established probable cause. That question can only be decided after a full trial before a fair and impartial jury. (App., *infra*, 32a.)

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[1] *See*, Kennedy, J., concurring in *Siegert v. Gilley*, 500 U.S. ___, 111 S.Ct. 1789, 1795 (1991):

> Upon the assertion of a qualified immunity defense the plaintiff must put forward specific nonconclusory factual allegations which establish malice or face dismissal.

The district court concluded that Robinson's statement that the first victim "had an opportunity to observe the subject closely" was untrue because, although she had been able to provide a reasonably detailed description of the rapist, the victim had seen the rapist only for a short time in the rear view mirror of her car,[2] and was blindfolded during the rape itself.

The court stated that Robinson's quotation of the first victim's statement that when she saw Bruning enter her workplace one week after the rape, she "knew it was him," was "quite different from" statements she made to another officer in a recorded interview in October, 1986, more than three months after the rape. The court characterized these later statements as indicating that her identification at that time "was little more than speculation." The court did not find the challenged statement untrue.

Finally, the court noted that Robinson's affidavit did not mention the October interview. The court did not characterize any portion of the October interview as exculpatory.

The district court found that Ferguson's statement that he was not aware of any facts tending to exculpate Bruning

> could be a literal truth as the statement of a layperson; but it can be considered a gross distortion of the quality of the information relied on and the scope of the investigation made from the perspective of a reasonably competent law enforcement officer. (App., *infra*, 30a-31a.)

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[2] The rapist had hidden in the back seat.

The district neither reviewed the affidavits for probable cause according to the analytical guidelines set forth in *Franks v. Delaware* at 438 U.S. 171-172, nor ruled that the officers' immunity had been overcome by the plaintiff's evidence.

The officers appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit, arguing that the district court had erred in failing to follow the law as set forth in *Franks v. Delaware*.

The officers argued that the information found inaccurate by the district court was not material, since its exclusion would not have destroyed probable cause, *see, Franks v. Delaware* at 438 U.S. 172 at n. 8 (inaccuracies irrelevant if remainder of affidavit establishes probable cause); and that the omitted information, if believed, was neither exculpatory, *U.S. v. Fitzgibbon*, 619 F.2d 874, 876 (10th Cir. 1980), nor material because its inclusion would not have destroyed probable cause.[3] *Stewart v. Donges*, 915 F.2d 572, 582-583 (10th Cir. 1990).

The Tenth Circuit, concluding that the officers had "failed to make a prima facie showing that their conduct was objectively reasonable" (App., *infra*, 18a), affirmed, without ruling that the officers' qualified immunity had been overcome.

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[3] Each affidavit related that Bruning specifically had been identified as the rapist by the first victim in an interview with Petitioner Robinson and another officer on October 24, 1986. That identification was not challenged by competent evidence.

The court of appeals refused to consider whether the information which Bruning claimed had been omitted wrongfully from the affidavits was exculpatory,[4] and did not discuss whether clearly established law at the time of the affidavits, *Anderson v. Creighton*, 483 U.S. 635, 640-641 (1987), required the officers to include all non-exculpatory information in warrant applications. Nevertheless, the court concluded that the omitted information was material to the county court's finding of probable cause because the omissions "directly *undermine* Victim #1's alleged identification of Plaintiff as her assailant." (Emphasis added; App., *infra*, 16a.)

The court of appeals did not discuss the petitioners' showing that the plaintiff had no evidence with which to meet his burden of proving that either officer actually entertained doubts as to the truth of the victim's identification, *U.S. v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984), citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), nor did it consider the effect of that showing under *Mitchell v. Forsyth* or *Celotex v. Catrett*. The court of appeals left undisturbed the district court's ruling that the officers' qualified immunity was an issue of fact to be determined by the jury after trial on the merits.

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[4] In the district court the officers had argued that the challenged statements and omissions were irrelevant. *Easton v. City of Boulder*, 776 F.2d 1441, 1451 (10th Cir. 1985). The court of appeals ruled that whether the evidence was exculpatory had not been raised in the district court.

REASONS FOR GRANTING THE PETITION

I.

1. The Tenth Circuit has rendered a decision in conflict with decisions of this Court, *Illinois v. Gates*, 462 U. S. 213, 233-34 (1983); *see also, U.S. v. Harris*, 403 U.S. 573, 599 (1971), (Harlan, J., dissenting); and with decisions of six other circuits, *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 10 (1st Cir. 1984); *U.S. v. Fooladi*, 703 F.2d 180, 183 (5th Cir. 1983); *Clay v. Conlee*, 815 F.2d 1164, 1168 (8th Cir. 1987); *U.S. v. Mahler*, 442 F.2d 1172, 1174-1175 (9th Cir. 1971); *U.S. v. Johnson*, 713 F.2d 654, 660 (11th Cir. 1983); *Trimble v. U.S.*, 369 F.2d 950, 951 (D.C. Cir. 1966); and has reversed its own precedent, *Karr v. Smith*, 774 F.2d 1029, 1032 (10th Cir. 1985), by ruling that the officers must supply evidence which, though not exculpatory, might "undermine" the credibility of the victim's identification.

In *Franks v. Delaware*, this Court stated that an officer's statements in a warrant application must be

> " 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." 438 U.S. at 165.

The issue is whether the officers believed the information set forth in their affidavits, not whether the evidence was accepted by others at a later hearing or trial.

The confusion created by these conflicting decisions is illustrated by comparing the Tenth Circuit's decision in this case with that of the Eleventh Circuit in *Goodson v. City of Atlanta*, 763 F.2d 1381 (11th Cir. 1985).

In *Goodson*, the § 1983 plaintiff was identified as the rapist by the citizen-victim, as in this case. He did not

meet her earlier description of the rapist in several particulars, as in this case. His car did not meet her description of the rapist's car. The victim told the arresting officer that she had been raped two weeks earlier, although she had reported the rape four months earlier. 763 F.2d at 1384. The court of appeals found that the officers had probable cause to support the warrantless arrest, stating that, "The officer was confronted with what he could not ignore, [the victim's] personal identification." 763 F.2d at 1386.

Thus, information similar to that which established probable cause to support a warrantless arrest in the Eleventh Circuit subjects a police officer who obtained an order for nontestimonial identification (which, under state law, requires a showing *less than* probable cause) to § 1983 liability and damages in the Tenth Circuit.

Until this conflict is resolved by this Court, neither the petitioners nor any other police officers can know whether they are acting in conformity with, or violating, a citizen's Fourth Amendment rights when they apply for a warrant or consider making an arrest without a warrant.

2. The Tenth Circuit has decided a matter of federal law in conflict with a decision of a state court of last resort, where the matter arose from actions controlled initially by state law. In doing so, the court of appeals has subjected the officers to liability for failure to perform a duty which neither the district court nor the court of appeals has found to have been clearly established at the time the officers submitted their applications.

Under Colorado law, a police officer does not need to show either the credibility of the victim or the reliability

of information obtained from her to establish probable cause for an arrest. *People v. Henry*, 631 P.2d 1122, 1127 (Colo. 1981). No clearly established state law requires police officers applying for warrants to submit information which might undermine that presumed credibility and reliability. Nevertheless, the Tenth Circuit's decision subjects the officers to § 1983 liability and damages for failing to assume that they were required by the Fourth Amendment to impeach that which they did not have to establish in the first instance under clearly established state law.

In *Anderson v. Creighton*, 483 U.S. at 640-641, this Court held erroneous the Eighth Circuit's refusal to consider the specific circumstances of the officer's actions because the issue to be determined was whether the officer could reasonably, even if mistakenly, have believed that his actions did not violate clearly established law. The Tenth Circuit's failure to consider the specific circumstances of the case, and its requirement of legal prescience on the part of the police officers, require review by this Court.

3. The Tenth Circuit's ruling retroactively changes the standard by which police officers determine whether an item of information is material to a finding of probable cause. Before this ruling, the Tenth Circuit considered information material only if it established or destroyed probable cause. *Stewart v. Donges*, 915 F.2d at 582-583. (*See*, 582 at n. 13: "The omitted information must be so probative as to negate probable cause.") The Tenth Circuit's decision now declares material that information which a police officer would not have considered material under the law at the time of his actions, *Hunter v.*

Bryant, 502 U.S. ___, 112 S.Ct. 534, 537 (1991), because the information, if believed, does not destroy probable cause.

4. The circuit courts of appeal generally have held that an omission, as opposed to the wrongful inclusion, of evidence which is material to the finding of probable cause may constitute a basis for denial of qualified immunity. *Stewart v. Donges*, 915 F.2d at 582. The standard for determining when a warrant is deficient because of omitted evidence, particularly in light of the threshold standards of *Franks v. Delaware*, is the subject of a split among the circuits.

The Fourth circuit considers omitted information less likely to mislead a reviewing magistrate determining whether an affidavit states probable cause, and therefore requires a plaintiff to make a greater showing of harm as to claims of omission, *U.S. v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) than that required for claims of wrongful inclusion of false information. The Tenth Circuit's ruling in this case indicates that claims of omission may require a lesser showing from a plaintiff than claims asserting the inclusion of false information, since some non-exculpatory evidence now must be included in warrant applications. Only this Court can resolve these diametrically opposed rulings.

5. The state rule of criminal procedure which provides for the order for nontestimonial identification requires only suspicion "not amounting to probable cause." The state court of last resort has ruled the provision valid and not in conflict with either the state or federal constitution, *People v. Madson*, 638 P.2d 18, 31-33 (Colo. 1981); *People v. Harris*, 729 P.2d 1000, 1002 (Colo.

App. 1986) *affirmed*, 762 P.2d 651 (Colo. 1988), *cert. denied*, 488 U.S. 985 (1988). Therefore, the issues to be addressed on summary judgment should have been: (1) Was each officer's conduct, as determined according to the truthfulness standards set forth in *Franks v. Delaware*, and in light of the amount of evidence required for the order and warrant by the applicable state law rules, a violation of Bruning's rights under the Fourth and Fourteenth Amendments; and (2) If so, was the law so clearly established that each officer would have known that his conduct violated those rights?

These issues require review and determination by this Court because of their effect on the daily activities of police officers across the nation.

II.

1. The circuit courts of appeal have split on the question whether a defense of qualified immunity is to be determined by the court as a matter of law, or by the jury as a mixed question of law and fact. Some have ruled that qualified immunity must be determined as a matter of law by the court, *Finnegan v. Fountain*, 915 F.2d 817, 821 (2nd Cir. 1990); *Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir. 1985); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991), while some have found that objective reasonableness and probable cause are issues of fact, to be submitted to and determined by the jury at trial. *See, e.g., B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d at 10; *Thorsted v. Kelly*, 858 F.2d 571, 575 (9th Cir. 1988). The Eighth Circuit appears to have ruled both ways. *Compare, Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir. 1989) with *Morris v.*

Clifford, 903 F.2d 574, 579 (8th Cir. 1990). The Tenth Circuit's decision in this case affirms, without discussion, the district court's ruling that the officers' qualified immunity must be determined by the jury at trial. (App., *infra*, 32a).

Because this Court has held that qualified immunity is from trial itself and the burden of preparation therefor, *Mitchell v. Forsyth*, 472 U.S. at 526; *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982), and because the Tenth Circuit and some of its sister courts appear to have departed from this Court's rulings, clarification of the question whether qualified immunity is strictly a legal or a mixed legal and factual issue is necessary. The petitioners urge that the Court determine how factual disputes involving immunity, such as whether an officer's actions were intentional or committed with reckless disregard, are to be decided before trial.

CONCLUSION

The Tenth Circuit's decision has ignored the rulings of this Court on the application of qualified immunity, and has upset the balance between the rights of criminal suspects and the rights and needs of society as a whole which this Court has sought to maintain. *Harlow v. Fitzgerald*, 457 U.S. at 813-814; As Justice Scalia said in *Illinois v. Rodriguez*, 497 U.S. ___, 110 S.Ct. 2773, 2799 (1990), one who is forced to undergo a reasonable, but fruitless, search, "suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society; he does not suffer a violation of the Fourth Amendment."

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JAMES BRUNING,

Plaintiff-Appellee,

v.

REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District; JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District; DISTRICT ATTORNEY'S OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT; FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department; CITY OF GUNNISON POLICE DEPARTMENT; JAMES ROBERT KEEHNE; RUSSELL LOCKE; ROBERT G. RYAN,

Defendants.

and

KEITH ROBINSON; J. STEWART FERGUSON,

Defendants-Appellants.

No. 90-1296

(Filed Nov. 15, 1991)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 87-M-1600)

Submitted on the briefs:

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Before McKAY, Chief Judge, EBEL, Circuit Judge, and SAFFELS,** District Judge.

EBEL, Circuit Judge.

Defendants Keith Robinson and J. Stewart Ferguson appeal the district court's order denying their Motion for Summary Judgment based on qualified immunity.[1] Both Defendants are members of the Gunnison, Colorado, Police Department (GPD), who contend that they are immune from liability for their alleged wrongful acts in obtaining an order for nontestimonial identification and

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**Honorable Dale E. Saffels, Senior District Judge, United States District court for the District of Kansas, sitting by designation.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

an arrest warrant for Plaintiff. "We review the denial of immunity *de Nova* as a final decision under 28 U.S.C. § 1291." *Snell v. Tunnell*, 920 F.2d 673, 675 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1622 (1991). Upon review, we conclude the district court properly denied Defendants' Motion for Summary Judgment.

I.

In the early hours of June 17, 1986, "Victim #1," who had just finished work at a grocery store in Gunnison, was sexually assaulted by a man who had hidden himself in the back of her car. Victim #1 reported the assault to Officer Keehne of the GPD, who failed to make any written or oral record of his conversation with Victim #1.

On June 25, 1986, Victim #1 saw Plaintiff, with whom she was acquainted, in the grocery store and was struck by his resemblance to her assailant. Victim #1 became upset, left work, and went to the GPD. She spoke with Officer Locke and Detective Robinson, but neither officer made any written or oral record of the conversation with Victim #1.

On September 5, 1986, Victim #2 was sexually assaulted in her home in Gunnison. She reported the assault to Officer Ryan of the GPD. Victim #2 was blindfolded throughout the assault and never saw her assailant.

On October 7, 1986, Durango Police Detective O'Connell, who was assisting with the investigation, interviewed Victim #1. Detective O'Connell tape recorded the

interview, and the recording was subsequently transcribed. During this interview Victim #1 described the assault and what she was able to see of the assailant as follows.

Victim #1 got into her car, which was parked at the grocery store, and turned on the dome light to get her cigarettes out of her purse. She sensed something in the back of her car and turned to see a man she did not know crouched in the back seat. Because he was able to crouch down so far, Victim #1 thought the man could not be very big: "Like five eight I think is pushin it." R. Vol. I, Doc. 6, Ex. C at 5. The man had a white handkerchief over his nose and mouth, so Victim #1 could not see his face below the bridge of his nose. She distinctly remembered that his eyes were icy blue, and described him as having a receding hairline, blondish hair, and a reddish complexion. When she looked at him, the man yelled at her to turn off the light, which she did. Victim #1 did not have an opportunity to see the man thereafter. He stayed behind her in the car while she drove to a deserted parking lot, at his direction, and while she got out of the car. Victim #1 was blindfolded during the assault and, at the assailant's direction, kept her head averted while he fled the scene.

During the interview with Detective O'Connell, Victim #1 said that she had been having nightmares about the assault and in them she knew the assailant. When asked who the assailant was in her dreams, she replied that it was different people. She also said she dreamed the assailant was her store manager one time, and that he was a customer in the grocery store in another dream, but she knew it was not really either of these people.

Victim #1 did not identify Plaintiff as the assailant, though in response to Detective O'Connell's statement: "It could well be that you will eventually recognize this guy," following the discussion of Victim #1's dreams, Victim #1 said:

[Victim #1]:	Well there is one person that gave, I've gave the name to the Police and stuff. It just freaked me out one day when he came in cause I know him, his girlfriend is one of the people I told I was working that night, you know, and.
Det. O'Connell:	Does he have receding blond hair?
[Victim #1]:	Yep.
Det. O'Connell:	And the icy blue eyes?
[Victim #1]:	Yep. And the build. And everything. And.
Det. O'Connell:	You could be right.
[Victim #1]	But it, I mean it bothers me but I can't even talk to this person anymore. You know.
Det. O'Connell:	Yeah. Well that's, even if it isn't him I'm sure he's gonna understand. He's too close to . . .
[Victim #1]	Yeah.
Det. O'Connell:	To the real thing, even if it isn't him.

Id. at 27. In response to Detective O'Connell's statement near the end of the interview: "You're still don't know who he is." Victim #1 responded "No." *Id.* at 30.

On October 24, 1986, Detective Robinson and Denver Police Detective Wallis interviewed Victim #1. They too failed to record the interview in writing or on tape. After the interview, Detective Robinson drafted an affidavit in support of an order for nontestimonial identification from Plaintiff in connection with the two assaults. Based on the affidavit, the court entered the order, which was carried out on October 27, 1986. Pursuant to the order, Plaintiff was required to give police samples of his fingerprints, blood, hair and saliva, to make a voice recording, and to be photographed.

On October 28, 1986, although all the samples from Plaintiff had not yet been analyzed, Officer Ferguson[2] drafted an affidavit in support of a warrant for Plaintiff's arrest for the two sexual assaults.[3] Plaintiff was arrested that day.

After the preliminary hearing, held on December 11, 1986, and January 22, 1987, the judge dismissed the charges for lack of probable cause. Plaintiff then brought this suit against Defendants and others for violation of

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[2] The record does not reveal Officer Ferguson's role in the investigation of either assault.

[3] The only evidence linking the two assaults together appears to be that in each assault the assailant held a knife to the victim's throat, blindfolded the victim, and wore what each victim thought was a nylon windbreaker. Also, the statements each victim reported the assailant made during the assault were similar.

his civil rights in connection with his arrest and prosecution.

II.

Plaintiff admitted that on their faces, Defendants' affidavits established probable cause. He contended, however, that the affidavits contained material false statements or omissions that Defendants made intentionally or with reckless disregard for the truth.

Specifically, Plaintiff alleged that Detective Robinson falsely and recklessly represented in his affidavit that Victim #1 had (1) positively identified Plaintiff as her assailant; (2) observed Plaintiff some days after the assault wearing grey sweatpants; (3) observed the color of Plaintiff's eyes; and (4) stated that Plaintiff's eyes were the same color as her assailant's. R. Vol. I, Doc. 1 at 3-4.

Plaintiff also alleged that Detective Robinson intentionally and maliciously failed to include in his affidavit the following information: (1) in the brief moment Victim #1 saw the assailant, he wore a mask over his face; (2) Victim #1 only saw the assailant's face above the bridge of his nose; (3) Victim #1 gave an extensive recorded statement to Detective O'Connell on October 7, 1986, for the purposes of identifying the assailant; (4) even though she knew Plaintiff before the assault, Victim #1 did not identify Plaintiff as her assailant during this interview; (5) in the interview Victim #1 said she did not know who assaulted her; (6) Victim #1 told Detective O'Connell that the man who assaulted her was not more than 5' 8"; (7) Plaintiff is 5' 11"; (8) Victim #1 described her assailant as being of slim to medium build; (9) Plaintiff weighs 190

pounds; (10) Victim #1 told Detective O'Connell her assailant had icy blue eyes; (11) Plaintiff has hazel eyes; (12) Victim #1 told Detective O'Connell she thought the man who assaulted her might be a person who worked at the Standard Gas Station in Gunnison; and (13) Victim #2 was blindfolded throughout her assault and could not identify her assailant. *Id.* at 4-5.

Plaintiff alleged that Officer Ferguson's affidavit contained the same false statements and omissions. Plaintiff claimed that by their misrepresentations, Defendants violated his rights under the Fourth and Fifth Amendments.

Defendants moved for summary judgment claiming qualified immunity under *Malley v. Briggs*, 475 U.S. 335 (1986). The Court held in *Malley* that an officer is immune from liability for his actions in seeking a warrant unless "a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court adopted an objective standard for qualified immunity. Under the *Harlow* standard, government officials will not be liable for their conduct when performing discretionary functions unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. "Because of the important values protected by qualified immunity, the procedures to be followed when this particular affirmative defense is raised differ from those applicable to most other affirmative defenses." *Powell v. Mikulecky*, 891 F.2d 1454, 1457 (10th Cir. 1989).

When a government official raises the defense of qualified immunity in a motion for summary judgment, the plaintiff must produce facts "sufficient to show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctrs. Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). Only after the plaintiff has met this burden must the defendant bear the usual summary judgment movant's "burden of showing that no material issues of fact remain that would defeat his or her claim of qualified immunity." *Id.; see also Powell*, 891 F.2d at 1457.

This procedure must be modified slightly, however, when the plaintiff's claim contains a subjective element, such as the defendant's purpose, motive, or intent. Prior to *Harlow*, the qualified immunity standard had both a subjective and an objective component. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective component focused on the good faith of the official and relieved him from liability if he did not actually know his conduct was unconstitutional and did not act with malicious intent. *Harlow* eliminated any consideration of the defendant's intent. *Harlow* eliminated any consideration of the defendant's intent as it relates to his knowledge of the law, *see Halperin v. Kissinger*, 807 F.2d 180, 186 (D.C. Cir. 1986), but did not preclude consideration of the defendant's intent when his state of mind is an essential element of the plaintiff's substantive claim, *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 648.

When a defendant moves for summary judgment asserting he is qualifiedly immune and his state of mind is an element of the plaintiff's claim, he must do more

than merely raise the immunity defense; he "must make a prima facie showing of the 'objective reasonableness' of the challenged conduct." *Lewis v. City of Ft. Collins*, 903 F.2d 752, 755 (10th Cir. 1990) (citing *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 649; *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1434 (D.C. Cir. 1987)). If the defendant makes this prima facie showing, the plaintiff must then produce specific evidence of the defendant's culpable state of mind to survive summary judgment. *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 649.

At the time Defendants drafted the affidavits at issue, the law was clearly established that an officer would violate a plaintiff's Fourth and Fourteenth Amendment rights by knowingly or recklessly making a false statement in an affidavit in support of an arrest or search warrant, if the false statement were material to the finding of probable cause. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984) (applying *Franks v. Delaware* standard to civil rights case involving arrest warrant). The law also was clearly established that "to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause," would violate a plaintiff's Fourth and Fourteenth Amendment rights. *Stewart v. Donges*, 915 F.2d 572, 582-83 (10th Cir. 1990).

A reckless disregard for the truth in the context of an alleged Fourth Amendment violation under *Franks v. Delaware* is the same as that in the context of an alleged First Amendment violation. A plaintiff must prove that "the affiant 'in fact entertained serious doubts as to the truth of his' allegations." *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984) (quoting *St. Amant v. Thompson*, 390

U.S. 727, 731 (1968)), *cert. denied*, 470 U.S. 1003 (1985); *accord DeLoach v. Bevers*, 922 F.2d 618, 622 (10th Cir. 1990), *cert. denied*, 112 S.Ct. 65 (1991). "Recklessness may be inferred from omission of facts which are 'clearly critical' to a finding of probable cause."[4] *DeLoach*, 922 F.2d at 622 (quoting *Hale v. Fish*, 899 F.2d 390, 400 (5th Cir. 1990); *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986)).

Because the state of mind with which Defendants allegedly acted was an element of Plaintiff's claim, Defendants had to make a prima facie showing that their actions were objectively reasonable. Defendants, however, did not submit any materials in support of their Motion for Summary Judgment. They did not file any affidavits attesting to their good faith, *Martin*, 812 F.2d at 1434, or establishing the objective reasonableness of their conduct, *Lewis*, 903 F.2d at 755. Instead, Defendants merely argued that Plaintiff could not establish their culpable state of mind and that any alleged false statements or omissions were not material to a finding of probable cause. On this record, it does not appear that Defendants made a prima facie showing that their conduct was objectively reasonable.

Moreover, Plaintiff came forward with specific evidence from which one could infer that Defendants recklessly made false statements in, and omitted material information from, their affidavits. As Plaintiff's expert witness said in an affidavit attached to Plaintiff's Brief in

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[4] This statement, of course, assumes that the affiant was aware of such omitted facts.

Opposition to Defendant-Police Officers' Motion for Summary Judgment, "the only material evidence in [Officer Ferguson's] affidavit linking [Plaintiff] to the offenses enumerated in the affidavit is the alleged identification of [Plaintiff] by one of the victims, [Victim #1]." R. Vol. I, Doc. 6, Ex. G at 2. Plaintiff pointed to evidence within Defendants' knowledge that clearly indicated Victim #1 could not positively identify Plaintiff, or any one else, as her assailant.

In denying Defendants' Motion for Summary Judgment, the district court focused on the following statements or omissions that it concluded were actionable: (1) Detective Robinson's statement that Victim #1 said she "had an opportunity to observe the subject closely," R. Vol. I, Doc. 6, Ex. B at 1; (2) Detective Robinson's statement that Victim #1 " 'knew it was him,' " when she saw Plaintiff in the grocery store on June 25, 1986, *id.*; (3) Detective Robinson's failure to mention Detective O'Connell's interview with Victim #1; and (4) Officer Ferguson's statement that he was "not aware of any other facts which would tend to exculpate [Plaintiff]," *id.* at Ex. D, p. 3. The district court also concluded that Officer Ferguson's affidavit suffered from the same deficiencies as Detective Robinson's affidavit.

Defendants argue that Detective Robinson's statement that Victim #1 had an opportunity to observe her assailant closely is true, as evidenced by her ability to describe the assailant in some detail. The statement is clearly misleading, however, in light of the information Detective Robinson omitted from his affidavit: that the man was wearing a handkerchief that concealed his face from the bridge of his nose down, and Victim #1 only saw

him briefly by the light of her dome light while he was crouched down in her back seat. The omitted information casts substantial doubt on Victim #1's ability to identify Plaintiff as her assailant and, therefore, is material to a finding of probable cause.

Defendants also contend that Detective Robinson's statement that Victim #1 said she "knew it was him" when she saw Plaintiff on June 25, 1986, is true. In their interview with Victim #1 after her encounter with Plaintiff on June 25th, however, neither Detective Robinson nor Officer Locke wrote down what Victim #1 told them. Officer Locke testified in his deposition that if Victim #1 had positively identified her assailant, he would have written it down. Furthermore, although Victim #1 allegedly identified Plaintiff as her assailant in this interview, the record does not reflect that the GPD took any action on this information until October 24, 1986. Both of these pieces of circumstantial evidence are sufficient to create an issue of fact as to whether Victim #1 actually made the statement Detective Robinson attributed to her in his affidavit. The statement is material, as it constituted a positive identification of Plaintiff as Victim #1's assailant. Also, one could infer from the GPD's failure to act on the information Victim #1 provided in the interview that Detective Robinson did not believe the information was sufficient to link Plaintiff to the crime.

Defendants contend that pursuant to *Easton v. City of Boulder*, 776 F.2d 1441 (10th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), they were not required to discuss in their respective affidavits any of the statements Victim #1 made in her interview with Detective O'Connell because

even if those statements were inconsistent or contradictory to the statements she allegedly made in the June 25th and October 24th interviews, they would not nullify probable cause. Defendants' interpretation of *Easton* is too broad.

Easton involved an alleged sexual assault on two young boys by a man who lived in their apartment complex. When the first detective interviewed the boys separately, each described going to the man's apartment where a nonviolent sexual assault occurred and later going to the laundry room with the man where he made a tent out of a blanket and assaulted one of the boys again. Each boy identified the man's apartment to the detective and together they took the police to the laundry room. There, the detective found a blanket, which the boys said was the one the man used to make a tent. The detective then contacted the building manager to determine who lived in the apartment the boys had identified. The manager said Daniel Easton lived in the apartment. *Id.* at 1443-44.

A week later, a second detective, who was experienced with juveniles, interviewed one of the boys again. At that time, the boy recalled only the incident in the laundry room. Although he denied being in the man's apartment, he identified the same apartment as the man's residence. The boy's description of what occurred in the laundry room remained consistent with his earlier account, however, and his description of the man was consistent with that given by the complex manager. At the end of the interview, the boy's stepfather saw a man coming out of his apartment across the complex and asked the boy if that man was the assailant. The boy

responded "yes." Thereafter, police approached the man and asked him his name. He identified himself as Daniel Easton. *Id.* at 1444.

Later that day, the detective interviewed the other boy again. His account of the laundry room incident was consistent with all other accounts. He again related that the boys were in the man's apartment, but denied that any assault took place there. He described the man as having lighter hair than the other boy did. *Id.* After the interview, the detective who first interviewed the children drafted an affidavit for Easton's arrest with the assistance of the second detective. The detective did not reveal in his affidavit that the first boy's statements as to whether he had been in Easton's apartment and whether he had been assaulted in Easton's apartment were contradictory, or that the two boys' descriptions of the assailant's hair color varied slightly. *Id.* at 1449.

> We concluded that the omitted inconsistencies
>
> d[id] nothing to undermine the solid core of the children's statements regarding the laundry room assault and the location of the perpetrator's apartment. Nor d[id] they detract from the detectives' impression, based on personal observation of [the first boy's] demeanor and behavior, that his statements were spontaneous and revealed knowledge of things that a child his age could not possibly possess had an event of the kind described not occurred.

Id. at 1450. We also noted that "[t]he detectives did not need [the first boy's] statement about a further assault in the man's apartment to establish probable cause *and did not rely on it in the affidavit they submitted to [the judge].*" *Id.*

at 1450-51 (emphasis added). We therefore held that "because the evidence excluded in no way alter[ed] the fact that the evidence included state[d] probable cause, the warrant was valid, whatever the intent of the officers, and Easton suffered no harm." *Id.* at 1451.

In contrast, the omissions here directly undermine Victim #1's alleged identification of Plaintiff as her assailant. That identification was virtually the only evidence linking Plaintiff to either of the assaults, and without it, there would be no probable cause to believe Plaintiff was the assailant. Defendants' interpretation of *Easton* as holding that an officer need never report an inconsistency in the statements of a victim or witness is completely unreasonable. *See also Stewart*, 915 F.2d at 583 (holding law was clearly established in December of 1985 that the victim's alleged recantation of his accusation was highly material to a finding of probable cause).

On appeal, Defendants argue that Officer Ferguson's statement that he was unaware of any evidence exculpating Plaintiff was true. They contend that exculpatory evidence is that which positively eliminates the defendant as the perpetrator, and none of the evidence Plaintiff claims Officer Ferguson omitted from his affidavit concerning Victim #1's ability to identify Plaintiff and how well Plaintiff fit Victim #1's description of the assailant tended to show Plaintiff could not be the assailant. Appellant's Reply Brief at 8-13. Defendants did not raise this argument as to the meaning of "exculpatory" evidence in the district court, however, so we will not consider it on appeal. *Gillihan v. Shillinger*, 872 F.2d 935, 938 (10th Cir. 1989); *see also Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 887 (10th Cir. 1991) ("We are not

obligated to address an argument which was not made in the district court, nor even in this court until the reply brief.").

Officer Ferguson knew Victim #1 made statements to Detective O'Connell that undermined her ability to identify Plaintiff as her assailant and he knew that Plaintiff did not fit Victim #1's description of the assailant in all respects, including that he had hazel rather then "icy blue eyes," yet he not only failed to set forth this information in his affidavit, he positively stated he was unaware of any facts tending to exculpate Plaintiff. Officer Ferguson's statement was not only false and misleading, but material to the finding of probable cause.

In his affidavit, Plaintiff's expert witness, a former police officer and chief investigator for a District Attorney's Office, opined that under the circumstances,

> the information relied upon by [Officer Ferguson] in the preparation of the affidavit for issuance of an arrest warrant was so obviously contraindicated as to the positive identification of [Plaintiff] by [Victim #1], that to include it in the affidavit without qualification or explanation constitutes a deviation from what an objective and reasonable police officer would consider appropriate in like circumstances.

R. Vol. I, Doc. 6, Ex. G at 4. Detective Robinson's affidavit suffered from the same deficiencies as Officer Ferguson's affidavit.

The statements Defendants made in their affidavits and the information they omitted from those affidavits concerned facts that were "clearly critical" to a finding of probable cause. A factfinder could infer that Defendants

made the statements and omitted the information with reckless disregard for the truth. *See DeLoach*, 922 F.2d at 622.

III.

In conclusion, Defendants failed to make a prima facie showing that their conduct was objectively reasonable, while Plaintiff pointed to specific evidence that Defendants' conduct violated clearly established rights of which a reasonable officer would have known. Therefore, the district court properly denied Defendants' Motion for Summary Judgment. The ruling of the United States District Court for the District of Colorado is AFFIRMED, and the action is REMANDED for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1600

JAMES BRUNING,
Plaintiff,

v.

REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District and JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District, DISTRICT ATTORNEYS OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT, FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department, CITY OF GUNNISON POLICE DEPARTMENT, JAMES ROBERT KEEHNE, RUSSELL LOCKE, ROBERT G. RYAN, KEITH ROBINSON, and J. STEWART FERGUSON,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Sep. 26, 1990)

MATSCH, Judge

On October 24, 1986, Detective Keith Robinson of the Gunnison, Colorado, Police Department, submitted an affidavit to a County Court judge as support for an order for non-testimonial identification of James Bruning for

investigation of two rapes reported to the Gunnison Police Department. The pertinent paragraphs of the affidavit are as follows:

> (1) There is probable cause to believe an offense has been committed, Sexual Assault in the first degree, C.R.S. 1973, 18-3-402 (F-2), in Gunnison County, Colorado on June 17, 1986 at approximately 1 AM as [Victim #1] was leaving her place of employment, City Market, which is located in the City and County of Gunnison, [Victim #1] entered her locked maroon Honda Accord, and while sitting on the driver's seat she turned on the car's dome light and discovered a male subject in the back seat. [Victim #1] had an opportunity to observe the subject closely. The subject threatened [Victim #1] with a knife, ordered her to turn off the light, and ordered her to drive to a nearby bank parking lot where he ordered her out of the car and did sexually assault her, threatening her with a knife. During this attack he did blindfold her, and did bind her wrists. He ordered her to "tell me that you like it", also questioning her about boyfriends, and admiring her body. After the assault, [Victim #1] contacted the police, reporting the crime and describing the perpetrator as a white male in his twenties having receding brownish-blond hair, blue eyes, and wearing a blue nylon windbreaker and gray sweatpants.
>
> (2) On or about June 25, 1986 [Victim #1] was working at City Market when she observed a party known to her as "Jim" enter City Market. [Victim #1] greeted him and observe he quickly turned away from her without responding. She then noticed that he was wearing a blue nylon windbreaker and gray sweatpants. She also

noticed this person had identical hair color and style and eyes as the person who had sexually assaulted her. [Victim #1] reported that at this time, she "knew it was him", meaning the person who had sexually assaulted her.

(3) [Victim #1] reported that "Jim" is the boyfriend of Monica Gustafson, who she is acquainted with, and has met "Jim" on three occasions socially and was told that he worked at AJ Upholstery in Gunnison.

(4) On 09-05-86, [Victim #2] reported that at approximately 12:30 AM, as she slept on her sofa, a male party unknown to her entered her residence, 509 West Virginia, which was then and is now located in the City and County of Gunnison, and sexually assaulted her at knifepoint. During this assault, in which the victim was blindfolded and bound at the wrists, the suspect instructed her to say to him "tell me you want me to fuck you", and also questioned her about her boyfriend, and admired her body. In this attack, the knife was described as a utility knife.

(5) On 10-24-86, your affiant met with victim, [Victim #1], who reported that she had been reluctant to come forward and inform the police about her identification of the suspect because Monica is a friend. Through investigation, your affiant learned that "Jim", the boyfriend of Monica Gustafson, is James A. Bruning, DOB 08-03-58, one of the owners of AJ's Upholstery. Your affiant know[n]s that linoleum knives and utility knives are common tools in the upholstery trade.

Exhibit B to Plaintiff's Brief.

The County Court entered an order under Rule 41.1 of the Colorado Rules of Criminal Procedure, requiring Mr. Bruning to provide blood, saliva and hair specimens, fingerprints, voice recordings and to be photographed. That order was carried out on October 27, 1986.

On October 28, 1986, Officer J. Stewart Ferguson signed an affidavit for the issuance of a warrant to arrest James Bruning on charges of sexual assault in the first degree, second degree kidnaping, first degree sexual assault and first degree burglary. In that affidavit, Officer Ferguson described the two reports of rape and included the following paragraphs:

> (2) On June 17, 1986 [Victim #1] reported to Officer Keehne of the Gunnison Police Department that she had been raped. [Victim #1] reported to Officer Keehne that on June 17, 1986 at approximately 1:00 AM she left work at City Market, located at 400 West Virginia Avenue, Gunnison, Gunnison County, Colorado, and got into her car which was parked in the City Market parking lot. [Victim #1] stated that when she got into her car she turned on the dome light and discovered a person in the rear seat. She described the person as a white male, slim to medium build, average height, with straight blond hair, mustache, and sweat pants. She reported that the subject threatened her with a knife, ordered her to turn off the light, and directed her to drive to Columbia Savings and Loan, located at 200 North Spruce Street, Gunnison, Gunnison County, Colorado, where he ordered her out of the car and to a nearby dark area where he forced her to engage in sexual intercourse with him.

(2) In subsequent interviews with Det. Locke, Gunnison Police Department, and Det. O'Connell, Durango Police Department, [Victim #1] described the suspect as having blond hair, receding or thinning in the front, blue eyes, a mustache, a reddish complexion, and wearing a blue nylon windbreaker-type jacket, gray sweat pants, and a white handkerchief over his mouth and nose. She also reported that the suspect had an unusual odor about him, kind of outdoorsy, and that he had hairy legs.

(3) In an interview with Det. Robinson, [on 10-24-86] Gunnison Police Department, following up on earlier remarks made by [Victim #1], [Victim #1] stated she had seen the person who sexually assaulted her several days later while she was working in City Market. She reported that "Jim", the boyfriend of Monica Gustafson, an acquaintance, had entered the store and that when she greeted him he looked away without responding. She then noticed that he was wearing a blue nylon windbreaker, gray sweat pants, and that he had blond hair that was receding and blue eyes. She reported that she then suddenly realized that he was the person who sexually assaulted her on June 17, 1986. She reported that she immediately became very excited and unable to continue work, calling for someone to take her place for the remainder of the day.

(4) [Victim #1] reported further that she recalled that Monica Gustafson had been in City Market the evening before the assault and that Ms. Gustafson was the only person other than the store employees she told about working late that night. [Victim #1] stated that "Jim" was Ms. Gustafson's boyfriend and that he worked at

> AJ's Upholstery. She also advised that Ms. Gustafson works for Western State College.
>
> (5) Sgt. Ferguson, Gunnison Police Department, contacted Robert Goodnough, Western State College Business Office, and asked if he was acquainted with Monica Gustafson and if he knew her boyfriend. Mr. Goodnough advised he knew Ms. Gustafson and called back to report that her boyfriend was Jim Bruning who owns AJ's Upholstery. Police Department records revealed that James A. Bruning is a co-owner of AJ's Upholstery.

Exhibit D to Plaintiff's Brief.

The affiant also referred to the photographing on October 27, 1986 and said that he observed an unusual feature, possibly a scar on Mr. Bruning's tongue in the photographs taken of him. The significance of that statement comes from the report of Victim #2 that her assailant had a very distinctive feature or scar on his tongue.

James Bruning was arrested and went to a preliminary hearing on December 11, 1986. That hearing was continued on January 22, 1987, and, at the close of the hearing, the judge dismissed the charges for lack of probable cause.

James Bruning has filed a complaint asserting claims for relief under 42 U.S.C. §§ 1983 and 1985 together with pendent claims for malicious prosecution, false arrest and imprisonment, negligence, negligent infliction of emotional distress and outrageous conduct. Reid C. Pixler was dismissed from the action by stipulation. The defendants have filed motions for summary judgment and the

plaintiff moved for partial summary judgment. At the hearing on these motions, the plaintiff voluntarily dismissed his claims against the district attorney's office, Floyd Johnson, James Robert Keehne and Robert G. Ryan.

The plaintiff's Section 1983 claims against defendants Robinson and Ferguson are based on their respective affidavits which are asserted to be false and an infringement of plaintiff's constitutionally protected rights as clearly established by *Franks v. Delaware*, 438 U.S. 154 (1978). These defendants claim qualified immunity under *Malley v. Briggs*, 475 U.S. 335 (1986).

The first question is whether the plaintiff has shown a violation of *Franks v. Delaware*. The plaintiff's contention is that both officers misrepresented the identifications made by Victim #1. There is uncertainty about what she said in her initial report to Officer Locke on June 17, 1986, because he did not take notes or make a written report of the conversation. Victim #1 went to the Gunnison Police Department on June 25, 1986, to report her observation made earlier on that day. She talked to Officers Locke and Robinson. Neither made a record or report of what she said. Officer Locke testified at his deposition that he made no written record of the June 25 interview but that he would have done so if Victim #1 had made a positive identification of her assailant. At the request of the prosecutors, Detective Robinson wrote a memorandum on December 10, 1986, the eve of the preliminary hearing, as follows:

SUPPLEMENTAL REPORT

Det. Robinson 12-10-86 86-1073

During the pretrial conference it was learned that no report had been made concerning [Victim #1] coming to the police department in June to report seeing a suspect in City Market.

I was present in the office with Russ Locke when [Victim #1] came into the office. [Victim #1] was visibly upset. [Victim #1] advised that she had observed a subject in the store that she thought was the pe[r]son who assaulted her. Upon seeing this person she became upset and left work coming to the police department. [Victim #1] identified the subject as being the boyfriend of a friend and worked at AJ's Upholstery.

There is a written transcript of a lengthy interview of Victim #1 by Durango Detective Sharon O'Connell on October 7, 1986, referred to in Ferguson's affidavit of October 24, 1986. During that interview, the victim described the event in considerable detail. She distinctly remembered that her assailant had icy blue eyes. She also made the following comments about her ability to identify him:

[Victim #1]: And that's what really scares me cause I've drempt [sic] that, like I've drempt [sic] that it's my manager at the store, which I know it's not but in my dream it's you know, or somebody that I've been waiting on out at Tomichi or something but I know it's not these

	two people but in my dream I know who it is.
Det. O'Connell:	It could well be that you will eventually recognize this guy.
[Victim #1]:	Well there is one person that gave, I've gave the name to the Police and stuff. It just freaked me out one day when he came in cause I know him, his girlfriend is one of the people I told I was working that night, you know, and.
Det. O'Connell:	Does he have receding blond hair?
[Victim #1]:	Yep.
Det. O'Connell:	And the icy blue eyes?
[Victim #1]:	Yep. And the build. And everything. And . . .
Det. O'Connell:	You could be right.
[Victim #1]:	But it, I mean it bothers me but I can't even talk to this person anymore. You know.

Exhibit C to Plaintiff's Brief, pp. 82-83.

The detailed description of the assault given to Detective O'Connell by Victim #1 makes it clear that she did not have "an opportunity to observe the subject closely" because he wore a handkerchief over his nose and mouth in the car, stayed behind her until she was blindfolded and kept the blindfold on her during the sex acts.

On October 30, 1986, Victim #1, accompanied by her lawyer, met with District Attorney Pixler, Assistant District Attorney Pacyga and Officer Ferguson. At that meeting, she said that she could not positively identify James Bruning as her assailant and that the police had apparently misunderstood her earlier statements. Pacyga testified in his deposition that he then concluded that the affidavits did not accurately reflect the victim's present ability to identify James Bruning. The parties elected not to take the deposition of Victim #1 in this civil action. It has not been disputed that James Bruning has hazel eyes, a fact which was observable during the court ordered photographing on October 27, 1986.

The final paragraph of defendant Ferguson's October 29, 1986, affidavit states:

> "I am not aware of any other facts which would tend to exculpate James Allen Bruning."

Exhibit D to Plaintiff's Brief

Plaintiff has submitted an affidavit of Rand B. Hendrickson, a former Denver police officer and chief investigator for the district attorney for the Second Judicial District in Colorado. In that affidavit, Mr. Hendrickson expressed the opinion that the affidavit for arrest warrant contained sufficient information to issue the arrest warrant but that his conclusion was based directly on the reported identification of Bruning by Victim #1. Mr. Hendrickson believed that without the statements of a positive identification of Bruning by Victim #1, the affidavit would be insufficient to show probable

cause. In his view, the affidavit ignored the victim's statements in her interview with Det. O'Connell and the failure of police officers to record and act on the statement of identification made on June 25, 1986, cast doubt on the veracity of the officers' statements. Mr. Hendrickson opined that if such an identification had been made that failure to record and act would constitute professional incompetence.

The plaintiff has also submitted the affidavit of Pat Delaney, who was the Assistant District Attorney assigned to assist Mr. Pacyga at the preliminary hearing in the Bruning case. Mr. Delaney recalled that on December 11, 1986, an attorney representing Victim #1 told Mr. Delaney that it was not true that his client had positively identified James Bruning as the rapist as represented in the affidavits. Mr. Delaney included this statement in his affidavit:

> "Moreover, had the affidavits of the police officer properly reflected the nature and extent of [Victim #1's] testimony, I would never have filed this case."
>
> Exhibit F to Plaintiff's Brief

To avoid summary judgment, the plaintiff must show that he had sufficient evidence to support a jury finding that the affidavits were false in material respects and that the falsity resulted from deliberate falsehoods or reckless disregard for the truth by the affiants. Falsity may be shown not only by what is misrepresented but also by what is omitted. See citations of authority in *United States v. Williams*, 737 F.2d 594, 604 (7th Cir. 1984).

As previously noted, contrary to the statement in paragraph 1 of the Robinson affidavit, Victim #1 did not have an opportunity to observe the subject closely. The statement in paragraph 2 of that affidavit that Victim #1 "knew it was him" when she saw James Bruning on June 25, 1986, is quite different from the recorded statements of this victim made to Det. O'Connell. The credibility of that statement is further eroded by the failure of the officers to make any report of their conversation with Victim #1 on June 25, 1986, particularly in view of Officer Locke's testimony that he would have made a record of a positive identification. The Robinson affidavit makes no mention of the interview with O'Connell and a fair reading of that interview transcript would support a finding that the victim's identification of Bruning was little more than speculation, primarily based on her attributing significance to her statement to Monica Gustafson that the victim would be working late that night. The record is not clear as to what Victim #1 said at the October 24, 1986 interview, except for the statement that she had been reluctant to come forward and inform against Monica's friend. Given the very limited information available to him on October 24, 1986, a jury could find that Det. Robinson's affidavit was made with reckless disregard for the truth of the representations concerning Victim #1's ability to identify James Bruning as her assailant and that the affidavit was materially false.

The Ferguson affidavit is primarily based upon the same statements of Victim #1 and suffers from the same deficiencies. Additionally, Officer Ferguson's denial of awareness of any exculpatory facts could be a literal truth as the statement of a layperson; but it can be considered a

gross distortion of the quality of the information relied on and the scope of the investigation made from the perspective of a reasonably competent law enforcement officer. The plaintiff has met his burden of demonstrating evidentiary support for the violation of clearly established law by Officers Robinson and Ferguson in submitting false affidavits.

The next question is whether the evidence can overcome the defendants' assertion of qualified immunity under the *Malley v. Briggs* standard. Accordingly, the particular question is whether the plaintiff has made a sufficient showing that the jury could find, on an objective basis, that no reasonably competent officer would believe that Victim #1 had sufficiently identified James Bruning as her assailant to support a finding of probable cause justifying his arrest. That question must be resolved under the totality of the circumstances. The officers have a duty to evaluate the credibility of a complaining witness and the information she gives them. In this case, the officers seek to avoid responsibility by accepting two identifying statements, made on June 25, 1986, and October 24, 1986, of a frightened young woman experiencing the aftershocks of a forcible rape in a small community where that is an extraordinary crime. The failures of the police to obtain and preserve physical evidence and to report and record information given to them colors their credibility in their recollection of the statements upon which they relied as well as that of their informant.

Plaintiff's witness Hendrickson has expressed the professional opinion that the police work done in this investigation was incompetent and that the inclusion of the report of a positive identification of James Bruning by

Victim #1 in these affidavits would not have been done by a reasonably competent police officer. The defense of qualified immunity presents a legal question presented on motions for summary judgment. While the court has the responsibility to evaluate the quality and quantity of the plaintiff's evidence in determining that question, recognizing that the doctrine of qualified immunity includes immunity from trial, the plaintiff must not be deprived of the opportunity to have factual disputes determined by the jury as the constitutional trier of fact in cases brought under Section 1983. In matters involving professional judgment, opinion testimony is of extreme importance and that is true in this case. Neither jurors nor judges should be able to set standards of objective reasonableness where special knowledge, experience and training are involved in the defendant's conduct. Thus, the ultimate fact to be found is whether a reasonably competent police officer in the position of the defendants Robinson and Ferguson would have submitted these affidavits to the court in the belief that they were accurate and that they established probable cause. That question can only be decided after a full trial before a fair and impartial jury.

The plaintiff has failed to show adequate support for liability of the City of Gunnison because he has not offered any competent evidence that the police officers were acting pursuant to any established regulations, custom or practice of the City. The only evidence against Officer Russell Locke is his failure to record and report the statements made by Victim #1 to him on June 17 and June 25, 1986, and his failure to preserve physical evidence such as the clothing she wore at the time of the

attack. At best, that demonstrates negligence in performing police duties but that is an insufficient predicate for liability in this particular case.

The claim against Joseph S. Pacyga is based upon a contention that he acted outside the scope of the absolute immunity granted to prosecutors as officers of the court under *Imbler v. Pachtman*, 424 U.S. 409 (1976). It is undisputed that Mr. Pacyga reviewed the subject affidavits to comply with a standing state court order requiring the district attorney's office to screen such affidavits before submission to the court. The plaintiff has offered nothing to show that Mr. Pacyga had the same knowledge as the police officers or that he had any reason to disbelieve the statements made in the affidavits. Accordingly, his view of them would be the same as the plaintiff's expert witness, Mr. Hendrickson. Therefore, Mr. Pacyga cannot be liable for a *Franks v. Delaware* violation. While he had additional information before proceeding with prosecution of the charges, the decision to go forward was made as a lawyer, an officer of the court, which is within the absolute immunity provided by *Imbler v. Pachtman*.

The plaintiff's claim under 42 U.S.C. § 1985(3) is legally insufficient because there is no allegation or evidence of a class or race-based animus as required under *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).

The plaintiff's pendent claims for relief under state law are barred by the official immunity granted by the Colorado Governmental Immunity Act, C.R.S. § 24-10-118(2). The named defendants were all acting

during the performance of their duties and within the scope of their employment and the plaintiff has not shown that their acts or omissions were willful and wanton.

The plaintiff filed his motion for partial summary judgment on the claim that the finding of no probable cause at the preliminary hearing in the state court criminal proceedings should have a collateral estoppel effect on this proceeding. The motion must be denied because the issues are different. The preliminary hearing decided that no probable cause existed at the time of the preliminary hearing, based upon all of the evidence then before the court. The issue in this case is whether the remaining defendants, Officers Robinson and Ferguson had objective probable cause to believe that their affidavits were sufficient at the time they were signed.

Upon the foregoing, it is

ORDERED that this civil action is dismissed as to all of the defendants and all of the claims excepting for the claims against the defendants Keith Robinson and J. Stewart Ferguson, individually, under 42 U.S.C. § 1983, based on their respective affidavits and it is

FURTHER ORDERED that the plaintiff's motion for partial summary judgment is denied. It is

FURTHER ORDERED that a status conference will be held on October 18, 1990, at 10:00 a.m. in the Conference Room, Second Floor, Post Office Building, 19th and Stout

Streets, Denver, Colorado, to discuss further proceedings on the remaining claims.

Dated: September 26, 1990

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES BRUNING, Plaintiff-Appellee, v. REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District and JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District, DISTRICT ATTORNEY'S OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT, FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department, CITY OF GUNNISON POLICE DEPARTMENT, JAMES ROBERT KEEHNE, RUSSELL LOCKE, ROBERT G. RYAN, KEITH ROBINSON, and J. STEWART FERGUSON, Defendants. and KEITH ROBINSON, J. STEWART FERGUSON, Defendants-Appellants.	)	No. 90-1296

ORDER

(Filed December 13, 1991)

Before McKAY, Chief Judge, and EBEL, Circuit Judge, and SAFFELS*, District Judge.

This matter comes on for consideration of appellants' petition for rehearing in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER,
Clerk

---

*Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

(2)

Supreme Court, U.S.
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APR 8 1992
OFFICE OF THE CLERK

No. 91-1450

In The

Supreme Court of the United States

October Term, 1991

KEITH ROBINSON AND J. STUART FERGUSON,

Petitioners,

v.

JAMES BRUNING,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the record sufficient to generate a disputed issue of material fact as to whether the police officers who submitted allegedly materially false affidavits violated plaintiff's constitutionally protected rights as clearly established by *Franks v. Delaware,* 438 U.S. 154 (1978)?

2. Did the Tenth Circuit correctly find that the evidence in this case was sufficient to support a jury finding that no reasonably competent police officer in the position of the defendant-police officers would have drafted and submitted the subject affidavits in the belief that they were accurate and that they established probable cause?

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No. 91-1450

In The

Supreme Court of the United States

October Term, 1991

KEITH ROBINSON AND J. STUART FERGUSON,

Petitioners,

v.

JAMES BRUNING,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

Petitioners did not provide a statement of facts to the Court. Rather, they provide a vague and rambling "Statement of the Case" which contains misstatements of fact and material omissions. Respondent will recite the undisputed facts of this matter to assist the Court in fully and adequately assessing the merits of the petition.

A. STATEMENT OF FACTS

On June 17, 1986, a young woman (Victim #1) was raped in Gunnison, Colorado. Contrary to the assertions of the petitioners, the only opportunity this victim had to

observe her assailant was in the rear view mirror of her darkened vehicle shortly after she entered it at night. The assailant was hidden in the back seat with a white handkerchief over his face. The assailant immediately ordered the victim to turn off the vehicle's dome light. The victim instantly complied. This momentary encounter was the last and only opportunity the victim had to visually observe her assailant. She was wholly unable to observe any portion of the assailant's body and saw only the upper portion of his face above the handkerchief.

The victim was then ordered to drive to a secluded place where she was blindfolded and sexually assaulted. This undisputed information is contained within the recorded statement provided by the victim to Detective Sharon O'Connell of the Durango Police Department on October 7, 1986. This interview will be referred to as the "O'Connell interview."

On the evening of the rape, this victim was interviewed by Russell Locke, a member of the Gunnison Police Department. The victim could not identify her assailant in this interview. Officer Locke forgot to make a written report of this interview. Defendant Locke also failed to assure that the victim's clothing was retained as evidence. The clothes the victim was wearing at the time of the assault were therefore discarded at the hospital where she was treated.

On June 25, 1986, the victim went to the Gunnison Police Department and was interviewed by Officer Locke and the defendant Robinson. This interview will be referred to as the "Locke/Robinson" interview. It is not clear what the victim told these officers at this meeting

since again neither officer made any type of written report. Defendant Robinson claims the victim identified James Bruning as her assailant. However, Officer Locke testified in his deposition that *had* the victim identified any assailant in this interview, he would have made a written report. Specifically, Officer Locke stated:

> Q: Now, if she had given you details, would you have written them down?
>
> A: If she had made a positive identification, I believe I would have, yes.
>
> Q: Would it be fair to say that she never said she knew this was the man that raped her?
>
> A: Yes.

No individual was arrested nor was any other formal action taken by the Gunnison Police Department against any suspect in the months that followed this assault.

On September 5, 1986, a second woman was sexually assaulted in Gunnison, Colorado. This victim (Victim #2) was blindfolded throughout the assault and at no time before, during, or after, did she visually observed her assailant.

On October 7, 1986, Victim #1 gave an extensive recorded statement to Detective O'Connell ("O'Connell interview"). The O'Connell interview was a detailed description of the sexual assault that occurred on January 17, 1986. The transcription of the interview was thirty-one (31) pages. (App., *infra*, A-1.) This is the only recorded or written statement taken from Victim #1 by any law enforcement official. During this interview, the victim indicated she had been having nightmares about the

assault. When the victim was asked who the assailant was in her dreams, she answered that it was different people. She stated that she had dreamed it was her store manager at one time. At another time it was a customer in the grocery store where she worked. **At no time during the O'Connell interview of October 7, 1986, did the victim even mention James Bruning's name or identify him as her assailant.**

The victim knew the plaintiff James Bruning before she was assaulted. She had met him on a couple of occasions through James Bruning's girlfriend (now his wife), Monica Gustafson. In the O'Connell interview, the victim indicated that upon observing the assailant in the back of her vehicle, she realized she did not know who the person was. At the end of this recorded statement, Detective O'Connell acknowledged that the victim did not know who assaulted her, and the victim agreed:

> Det. O'Connell: . . . you've got a right to be scared. You're [sic] still don't know who he is.
>
> Victim: No.

(O'Connell interview, page 30.)

On October 24, 1986, the defendant Police Detective Robinson requested another statement from Victim #1. This defendant also failed to record the interview in writing or on tape. He claims to have taken no notes. After the interview, the defendant Robinson drafted an affidavit in support of an order for non-testimonial identification from the plaintiff James Bruning in connection with the two assaults. (App., *infra*, 51a.) The defendant Robinson sought an order that the plaintiff James Bruning submit to blood samples, saliva samples, voice samples,

hair samples, photographs and fingerprints. In reliance upon the representations of the defendant Robinson in his affidavit, the order was issued by a judge of the Gunnison County Court and was executed on October 27, 1986.

In the defendant Robinson's affidavit, he represented to the Court that:

1. On June 25, 1986, the victim (#1) had positively identified the plaintiff as her assailant;

2. The victim (#1) had observed the color of the plaintiff's eyes a few days after the assault;

3. The victim had stated that the plaintiff's eyes were the same color as her assailant's.

The respondent presented evidence at the trial level and at the appellate level that none of these statements were true.

Respondents also assert that the defendant Robinson intentionally and maliciously failed to include the following information in his affidavit:

1. That in the brief moment the victim was able to observe her assailant, the assailant wore a handkerchief over his face.

2. That the victim had only seen the portions of her assailant's face above the bridge of his nose.

3. That at no time during the O'Connell interview did the victim identify James Bruning as the person who assaulted her.

4. That during the O'Connell interview, the victim had indicated she could not identify who had assaulted her.

5. That during the O'Connell interview, the victim stated she did not know the person who assaulted her.

6. That during the O'Connell interview, the victim thought the man who assaulted her might be a person who worked at the Standard Gas Station in Gunnison.

7. That during the O'Connell interview, the victim stated that the man who assaulted her could not "be that big of a person. Like 5'8" is pushing it." That the plaintiff James Bruning is 5'11" and weighs 190 pounds.

8. That the victim had advised Detective O'Connell that the man who assaulted her had "icy blue eyes" and that the plaintiff James Bruning has hazel eyes.

9. That Victim #2 was blindfolded throughout her assault and could not identify her assailant.

On October 28, 1986, the defendant J. Stuart Ferguson submitted an "Affidavit for Arrest Warrant." (App., *infra*, 55a.) Despite the previous request for the non-testimonial identification studies, the defendant Ferguson did not wait until these studies had been completed to draft or submit the arrest affidavit. Only the blood sample results were returned by the time of the submission. These samples merely indicated that the plaintiff James Bruning could not be excluded from the crimes and fell within 58% of the individuals in the population who could have committed the crimes. No results from the saliva samples, voice samples, hair samples, photographs, or fingerprints

had been obtained.[1] In his arrest affidavit, the defendant Ferguson made representations to the court which were substantially similar to those made by the defendant Robinson (including a claim that Victim #1 had identified James Bruning as her assailant). The defendant Ferguson added to his affidavit a statement that he was unaware of any facts that would tend to exculpate James Bruning. Based on this affidavit, on October 28, 1986, the plaintiff James Bruning was arrested.

On October 30, 1986, Victim #1 became aware that the defendant-police officers were claiming that she had positively identified James Bruning as her assailant. On that same day, Victim #1 contacted her attorney, Michael Stern. Mr. Stern contacted Deputy District Attorney Joseph Pacyga and advised him that Victim #1 had *not* identified James Bruning. Specifically, in response to questions concerning his October 30, 1986 conversation with Mr. Stern, Deputy District Attorney Pacyga provided the following testimony:

> A: . . . I think what we were talking about and what I was talking about was the fact that she initially identified him and really no action had been taken on the fact that she identified him, and at that point in time Mike was saying to me that he had spoken to her. He hadn't gotten the impression from her that she could identify Mr.

---

[1] The results of these tests later showed: (1) fingerprints taken from Victim #1's car did not match fingerprints of James Bruning; (2) fingerprints from Victim #2's dresser drawers and a metal latch did not match fingerprints of James Bruning; and (3) foreign hairs from the quilt on which Victim #2 was raped did not match James Bruning's hairs.

> Bruning as her assailant. I said, well, Keith Robinson talked to her on such and such a date and told – she told Keith Robinson that you know, he was the person who had assaulted her, and she had identified him as being the person who had assaulted her.
>
> Q: And Mr. Stern said what about that?
>
> A: He said that he had talked to her and hadn't gotten that impression that that was what had happened.

(Pacyga depo., p.89,l.23-p.90,l.11.) Victim #1's attorney then requested a meeting with district attorneys Reed Pixler and Pacyga and the defendant Ferguson. This meeting was held on October 30, 1986. In this meeting Victim #1 stated she could *not* identify James Bruning as her assailant. In this meeting, the victim told the defendants who were present:

> That there must have been some sort of misunderstanding on the part of the police or something as to what she had said because she said that she can't say it was definitely Mr. Bruning.

(Pacyga depo., p.129,l.21-24.)

Mr. Pixler testified that in this meeting, the victim also stated:

> That she wasn't going to walk into court and point out James Bruning specifically and say he was the rapist.

(Pixler depo., p.114,l.3-4.)

Similarly, the defendant Ferguson understood that:

> [Victim #1] had raised the issue that maybe we had overstated what she had to say in the police

> report and wanted to make sure that we had it correctly.

(Ferguson depo., p.123,l.9-20.)

The defendant Robinson understood that the victim wanted to meet to make clear that she was:

> Not as forceful as we were leading in our affidavits or in our reports.

(Robinson depo., p.58,l.12-16.) Defendant Robinson understood that in this meeting, the victim stated that:

> She could not positively identify him. She was less than positive that it was him, okay, but was still saying along these lines that it could still be him (or [someone] looked like him) but did not want to be put on the stand for a positive id.

(Robinson depo., p.58,l.25-p.59,l.7.)

As a consequence of this meeting, district attorney Pacyga concluded that the police affidavits did not reflect the victim's current ability to identify James Bruning.

On December 8, 1986, district attorney Pixler contacted assistant district attorney Patrick Delaney and requested that he assist district attorney Pacyga in the preliminary hearing on the Bruning matter. During the preliminary hearing, the victim testified that she had *not* identified the defendant as the rapist. Attorney Delaney concluded there was insufficient evidence to believe that probable cause existed. In fact, Attorney Delaney executed an affidavit in the present case. (App., *infra*, 60a.) In paragraph 12 of his affidavit, Attorney Delaney states:

> In my opinion, as an experienced prosecutor, I did not feel that there was sufficient evidence to

> bind the case over for trial. Moreover, had the affidavits of the police officer properly reflected the nature and extent of the [victim's] testimony, I would never have filed the case.

On January 27, 1987, after two full days of preliminary hearing, Judge Algernon Reese determined that there was not probable cause to believe that James Bruning committed the crimes in question. The charges against Mr. Bruning were dismissed. Under the Colorado rules of criminal procedure, the charges could have been, but were not, refiled in the State District Court.

B. COURSE OF PROCEEDINGS

1. The Civil Rights Claim And Immunity Defense.

The plaintiff James Bruning filed a complaint asserting claims for relief under 42 U.S.C. § 1983 against the defendants Ferguson and Locke.[2] The plaintiff's Section 1983 claims against the defendants Robinson and Ferguson are based upon the drafting and submission of their respective affidavits. Plaintiff claims that the only material evidence in the affidavits linking James Bruning

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[2] Plaintiff also filed claims against District Attorneys Pixler and Pacyga and Gunnison police officers Johnson, Keehn and Ryan. District Attorney Pixler was dismissed from the action by stipulation of the parties. At the hearing on defendants' motion for summary judgment, the plaintiff voluntarily dismissed the claims against the District Attorney's Office and police officers Johnson, Keehn, and Ryan. At this same hearing, the district court dismissed the claims against the City of Gunnison as well as District Attorney Pacyga.

to the enumerated defenses is the alleged identification of James Bruning by Victim #1. Plaintiff claims that the affidavits (which asserted a positive identification had occurred and omitted the fact that the victim had not identified James Bruning) were false as drafted and submitted and violated plaintiff's constitutionally protected rights under *Franks v. Delaware*, 438 U.S. 154 (1978). The defendants claimed qualified immunity under *Malley v. Briggs*, 475 U.S. 335 (1986). The defendants filed motions for summary judgment under their qualified immunity defense.

In response to the defendants' motion, the plaintiff submitted the information developed from depositions of each of the defendants, the affidavit of district attorney Patrick Delaney, and the affidavit of Rand B. Hendrickson, a former Denver police officer and chief investigator for the District Attorney for the Second Judicial District in Denver, Colorado. (App., *infra*, 66a.) In his affidavit, Mr. Hendrickson expressed his opinion that without the claimed "positive identification" of Mr. Bruning by Victim #1, the affidavit would be insufficient to show probable cause. Mr. Hendrickson stated that the affidavit ignored the victim's statements in her interview with Detective O'Connell and that the failure of the police officers to record and act on the claimed identification made on June 25, 1986, cast doubt on the veracity of the officers' statements that such an identification had taken place. It was Mr. Hendrickson's opinion that if such an identification had been made on June 25, 1986, the failure to record the statement and act on it would constitute professional incompetence. It was also Mr. Hendrickson's opinion that no reasonably competent police officer would have submitted the affidavits in the belief that they were accurate or established probable cause.

2. The District Court's Order Denying Defendants' Motion For Summary Judgment.

In analyzing the issue, the District Court first analyzed whether the plaintiff had shown a violation of clearly established law under *Franks v. Delaware, supra.* The court recognized that it was plaintiff's contention that both officers misrepresented the identifications made by Victim #1. The court reviewed the O'Connell statement (App., *infra,* A-1) and concluded that it clearly showed that the victim did not have "an opportunity to observe the subject closely." The District Court found that a jury could find that Detective Robinson's affidavit was made with reckless disregard for the truth of the representations concerning Victim #1's ability to identify James Bruning as her assailant. The court also found that a jury could find that the affidavit was materially false. The District Court found that the Ferguson affidavit suffered from the same defects. The court found that the defendant Ferguson's denial of his awareness of exculpatory facts was a gross distortion of the information known to him. Under these facts, the court held that the plaintiff had met his burden of demonstrating evidentiary support for a violation of a clearly established law by the defendants in submitting false affidavits.

The court then considered whether the evidence could overcome the defendants' assertion of qualified immunity under the *Malley v. Briggs, supra,* standard. The court expressly recognized that the question must be resolved under the "totality of circumstances." In reviewing the circumstances, the court found that the failure of the police to obtain and preserve physical evidence and

to report and record information given to them "colors their credibility in their recollection of the statements upon which they relied as well as that of their informant." The court then determined that the ultimate fact to be found was whether a reasonably competent police officer in the position of the defendants would have submitted these affidavits to the court in the belief that they were accurate and that they established probable cause. The court found that that question should be resolved by a jury and denied the defendants' motion for summary judgment.

3. The Tenth Circuit's Affirmation Of The District Court Order.

The Court of Appeals reviewed the evidence before it *de novo*. Upon review of the record, the Court of Appeals concluded that the District Court properly denied the defendants' motion for summary judgment.

In its opinion, the Court of Appeals reviewed the evidence that had been presented to the district court. The Court found that at the time the defendants drafted the affidavits in question, the law was clearly established that an officer would violate a plaintiff's Fourth and Fourteenth Amendment rights by knowingly or recklessly making a false statement in an affidavit in support of an arrest or search warrant, if the false statements were material to the finding of probable cause. The Court of Appeals cited *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978). The Court of Appeals found that "recklessness" may be inferred from omissions of facts which are "clearly critical" to a finding of probable cause. The Court

of Appeals detailed the plaintiff's evidence and determined that the plaintiff had come forward with specific evidence from which one could infer that the defendants recklessly made false statements in, and omitted material information from, their affidavits. The Court found that the defendant Robinson's statement that Victim #1 had an opportunity to closely observe her assailant was "clearly misleading."

The Court also found that there was circumstantial evidence to create an issue of fact as to whether Victim #1 had actually made the statement to Detective Robinson attributed to her in his affidavit. The Court noted Officer Locke's testimony in his deposition that if Victim #1 had positively identified her assailant, he would have recorded this information. The Court also noted that the failure of the Gunnison Police Department to take any action on this alleged identification until October 24, 1986 was additional circumstantial evidence that Victim #1 did not identify any person in her statement of June 25, 1986. Lastly, the Court found that the omissions from the affidavits directly undermined Victim #1's alleged identification of the plaintiff as her assailant.

In summary, the Court of Appeals found that the defendants failed to make a *prima facie* showing that their conduct was objectively reasonable. The Court found that the plaintiffs had presented direct and specific evidence that the defendants' conduct violated clearly established rights of which a reasonable officer should have known at the time of the drafting of the affidavits. The Tenth Circuit affirmed the ruling of the United States District Court and remanded the action for further proceedings.

II. SUMMARY OF THE ARGUMENT

The Tenth Circuit decision does not conflict with any other case, and follows the established precedent of this Court. The Court of Appeals properly analyzed the issue of qualified immunity and properly found that the evidence in the record supported a finding that the defendant-police officers had violated clearly established law by intentionally and/or recklessly drafting and submitting materially false affidavits. No decision of this Court or any other circuit has held that police officers who submit materially false affidavits are entitled to qualified immunity as a matter of law. Under the facts of the present case, the Tenth Circuit properly ruled that the plaintiff had provided specific evidence that the defendants' conduct violated clearly established rights under the Fourth and Fourteenth Amendments and that a reasonable police officer under the circumstances would have known of the violation. There are no special or important reasons why this Petition for Writ of Certiorari should be granted. Respondent respectfully requests that the writ be denied.

III. ARGUMENT

A. REASONS FOR DENYING THE WRIT

1. The Court Of Appeals Decision Is Consistent With The Rulings Of This Court, Other Circuits, And The Tenth Circuit Which Hold That An Officer Violates A Suspect's Fourth And Fourteenth Amendment Rights By Knowingly Or Recklessly Making A False Statement In An Affidavit In Support Of An Arrest Warrant.

Contrary to the assertions of the petitioner, the holdings of the Court of Appeals is consistent with the ruling of this Court in *Franks v. Delaware*. This Court held that police officers drafting affidavits are constitutionally bound to avoid submitting affidavits containing deliberate falsehoods or which recklessly disregarding the truth. Any law enforcement officer drafting an affidavit at the time the defendants drafted the affidavits in this case, should have known this to be the law. Under the facts in the present case, no reasonably objective police officer could have believed that Victim #1 had actually identified the plaintiff James Bruning as her rapist. In addition, when the defendants inserted this statement in their affidavits, they inserted information which they knew or should have known was false. The Court of Appeals decision is at peace with *Franks v. Delaware*.[3]

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[3] The defendants cite *Anderson v. Creighton*, 483 U.S. 635 (1987) to support a claim that the Tenth Circuit failed to consider the specific circumstances of this case. *Anderson* does require that the court assessing a qualified immunity claim to review the totality of the circumstances. However, reviews of

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None of the circuit decisions cited by the petitioners on page 9 of their brief are in conflict with the decision of the Court of Appeals in this case. In none of those decisions was it held that exculpatory evidence available and known to police officers drafting affidavits may be excluded from the affidavits. None of those cases stands for the proposition that a police officer drafting an affidavit may affirmatively assert that a victim has identified a suspect, when the victim has not done so. None of those cases stands for the proposition that police officers may omit from an affidavit the fact that the victim of a crime did not have the opportunity to observe and cannot identify a suspect as her assailant. In fact, most of the cases cited by the defendants on page 9 do not even deal with exculpatory evidence.

The petitioners' assertion that the Court of Appeals reversed *Karr v. Smith*, 774 F.2d 1029, 1032 (10th Cir. 1985) is wrong. In *Karr*, a Section 1983 action against police officers went to trial and the trial court determined by motion for directed verdict that probable cause to arrest the plaintiffs had existed as a matter of law. The Tenth Circuit simply reviewed the facts of the case presented to it and determined that the information available to the arresting officers was sufficient to justify the arrest. There

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the written opinions of the District Court and the Tenth Circuit in this case reveal a detailed analysis of the facts presented to the police officers and the circumstances surrounding the drafting of their affidavits. The Tenth Circuit clearly followed the guidance of *Anderson v. Creighton* in reaching its decision to deny the petitioners' request for qualified immunity.

is nothing in the holding of the Court of Appeals in this case that in anyway contradicts *Karr v. Smith*.

The defendants' assertion that the Court of Appeals decision conflicts with *Goodson v. City of Atlanta*, 763 F.2d 1381 (11th Cir. 1985) is also incorrect. *Goodson* is a Section 1983 action involving an arrest. There was no issue concerning the drafting of affidavits in the *Goodson* case. Moreover, contrary to the present case, in *Goodson* it was undisputed that the victim positively identified the plaintiff as the man who had raped her. She was following the plaintiff in a car and pointed him out to the police. Those facts are demonstrably different than the ones presented to the Court of Appeals in the case at bar. There is nothing about the holding in the present case that would in anyway cause confusion on the part of an arresting officer. Officers drafting affidavits in support of arrest warrants are still bound to submit information that is accurate and are not free to recklessly disregard the truth.

Contrary to the assertions of the petitioners, there is no conflict of decisions to be resolved by this Court. The petitioners in this case (and all other police officers) have been provided sufficient guidelines to know when they are acting in conformity with, or violating, a citizen's Fourth Amendment rights in drafting affidavits. *Franks v. Delaware* and the opinion of the Court of Appeals in the present case show the way.[4]

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[4] Petitioners' assertion that the Tenth Circuit ruling "retroactively changes" the standard applicable to police officers in drafting affidavits is also wrong. In *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990), the Tenth Circuit reaffirmed that it would

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2. The Tenth Circuit's Decision Does Not Conflict With The Decisions Of The Colorado Supreme Court.

Petitioners assert that the Court of Appeals decision somehow conflicts with the decision of *People v. Henry*, 631 P.2d 1122 (Colo. 1981). The petitioners' recitation of that case is incomplete and misleading. As with many of the other citations relied upon by the petitioners, *People v. Henry* has nothing to do with the drafting of affidavits. Moreover, in *People v. Henry*, it was undisputed that the victim had identified the assailant. The Court held that the officers were entitled to rely upon this information "in the absence of any contrary evidence." *People v. Henry*, 631 P.2d at 1127. In the present case, the victim did not identify the plaintiff. It was in this setting that the Court of Appeals held that the police officers are subject to Section 1983 liability for failing to truthfully present this information to the Court.

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be a clearly established violation of a suspect's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause. *Stewart v. Donges*, 915 F.2d at 582-583. Petitioners' reliance upon *Hunter v. Bryant*, 502 U.S. ___, 112 S.Ct. 534 (1991) is also misplaced since this Court noted that in a Section 1983 action against law enforcement officials, the question is whether the officials "acted reasonably under settled law *in the circumstances* . . . ". At 537. This is precisely the standard that was applied by the Court of Appeals in the present case.

3. The Petitioners Misapprehend The Legal Significance Of The Information Omitted From The Subject Affidavits And Consequently Misapprehend Applicable Law.

The petitioners simply fail to acknowledge that the affidavits in question should have stated that Victim #1 could not identify her assailant. Had this information been included, there is no question that the affidavits would not have supported a finding of probable cause. This assertion stands unrefuted in the present record. The affidavits of Rand Hendrickson, the police investigator, and District Attorney Delaney are undisputed. Under the facts in the present case, no reasonable officer would have believed that the victim had identified the plaintiff or that probable cause to arrest the plaintiff existed.

The defendants attempt to manufacture a conflict between the Court of Appeals decision in this case and the Fourth Circuit decision of *U.S. v. Colkley*, 899 F.2d 297 (4th Cir. 1990). There is no such conflict. In *Colkley* (which is not a Section 1983 case), the affidavits in support of the arrest warrant were supported by an informant's account of the crime based upon admissions by the suspect to the informant. This information in and of itself would be sufficient to establish probable cause. The fact the police officers did not include in their affidavits the failure of eyewitnesses to identify the suspect in a photo lineup *would not have vitiated* probable cause. In contrast, in the present case the information affirmatively included in the affidavits, i.e., that Victim #1 had identified the plaintiff as her assailant was false. Moreover, the information omitted from the affidavits, i.e., that Victim #1 could not identify the plaintiff as her assailant *would have vitiated*

probable cause. The decisions of *U.S. v. Colkley* and the Tenth Circuit are consistent in their recognition and affirmation of these principles.

4. Nothing In The Colorado Rule For Non-Testimonial Identification Alleviates The Duty Of Officers To Submit Truthful Affidavits.

Contrary to the assertions of the petitioners, Colorado Criminal Rule of Procedure 41.1 does not relieve police officers drafting affidavits from their responsibilities to submit truthful affidavits. Detective Robinson's claim that the victim "had an opportunity to observe the subject closely" is false under the state rule of criminal procedure, just as it is false under the Fourth Amendment and Fourteenth Amendment. Moreover, nothing about the state rule of criminal procedure alleviates the responsibility of the police officers to avoid violations of a suspect's federal constitutional rights. These issues are sufficiently clear to provide the necessary guidance to police officers in their daily activities.

5. There Is No Split Of Authority On The Question Of Whether The Defense Of Qualified Immunity Is A Question Of Law For The Court - All Circuits Including The Court of Appeals In The Present Case Agree That The Question Of Qualified Immunity Is A Question of Law.

The petitioners attempt to manufacture a conflict in the circuit courts concerning the question of whether a defense of qualified immunity is to be determined by the court as a matter of law. No such split exists. Moreover,

the District Court and the Court of Appeals in the case at bar both expressly recognized and applied the rule that the question of qualified immunity is a question of law for the court.

All of the cases cited by the petitioners recognize this Court's directive in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987) that the question of qualified immunity is to be determined as a matter of law by the court. *Finnegan v. Fountain*, 915 F.2d 817 (2nd Cir. 1990); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985); *Ansley v. Heinrich*, 925 F.2d 1339 (11th Cir. 1991); *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7 (1st Cir. 1984); *Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988); *Gorra v. Hanson*, 880 F.2d 95 (8th Cir. 1989); *Morris v. Clifford*, 903 F.2d 574 (8th Cir. 1990). Moreover, contrary to the assertions of the petitioners, neither the First, Eighth, or Ninth Circuits holds to the contrary.

B.C.R. Transport Co., Inc., supra, did not arise in the setting of the denial of the summary judgment. Rather, that case involved a trial in which a jury returned a verdict against a police officer. The issue before the jury was not whether the defense of qualified immunity should be upheld, but whether probable cause had existed under the facts and circumstances of the case. Nothing in the First Circuit's holding conflicts with rulings of this Court or any other circuit that it is the role of the court to make the ultimate assessment of a qualified immunity defense.

In *Thorsted, supra*, the Ninth Circuit expressly held that the question of qualified immunity is a question of

law. The Court recognized that where there were factually specific issues to be resolved, a jury must decide them. The Court determined that it was appropriate for the jury to be instructed on the defense of qualified immunity at trial. Nothing in the holding of *Thorsted* conflicts with the holdings of this Court or any other circuit on the question of the role of the court in resolving a qualified immunity defense.

Defendants claim that the Eighth Circuit is internally inconsistent in its rulings citing *Gorra v. Hanson*, 880 F.2d 95 (8th Cir. 1989) and *Morris v. Clifford*, 903 F.2d 574 (8th Cir. 1990). The defendants' position in this regard is incorrect. Both cases intrinsically recognize that the question of qualified immunity is a question of law for the court. In *Gorra*, the court found as a matter of law that reasonable officers could have believed that probable cause existed and therefore, that the summary judgment motion of the defendants should have been granted. In *Morris*, the Court held that where disputed issues of fact exist, those issues must be resolved by the jury. Nothing about these decisions in any way conflicts with the decisions of this Court or any other circuit.

In the present case, the Tenth Circuit reviewed the facts *de novo* and determined that sufficient facts were generated to preclude the granting of qualified immunity as a matter of law. The Court did not rule nor imply that the ultimate decision on the defense of qualified immunity should be referred to the jury. Rather, the Court simply found that the underlying facts were sufficiently in dispute to require resolution by the trier of fact. Nothing about the Tenth Circuit opinion conflicts with any decisions of this Court or other circuits.

IV. CONCLUSION

The Tenth Circuit's opinion in this case conforms with all the rulings of this Court on the application of qualified immunity and is consistent with the decisions of other circuits. The interests of the defendants in being protected from discovery and trial in the event they were entitled to qualified immunity have been protected. The District Court and the Tenth Circuit have determined that the qualified immunity defense is not appropriate and that trial on the merits should proceed. Nothing about this case presents any novel or unique issues that would justify the granting of this writ. For all the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April, 1992

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APPENDIX 1

INTERVIEW

Time:
Date: Oct. 07, 1986
Present: Janice Daily
Det. Sharon O'Connell, Durango Co. P.D.

Ms. Daily: Well I've never, Okay, I've never worked that shift, ever. The lady that used to work it, that shift, had her baby that day was all, that's why they had me work the shift. They had me finish out an 8 hour shift cause nobody else could cause they would be over-time and, and you know, that shit,

Det. O'Connell: Right. Especially now.

Ms. Daily: Yeah. So, they just had me go on and finish out my 8 hour shift. They ask me in the back, there was no one around, the only one was there was Tom Reese and the guy that ask me to work the shift. They were the only ones that basically knew I was gonna work that shift. And then this other girl was up front and she ask if I was gonna work cause they had asked her to work and she couldn't. I said Yeah. And then the one other lady I told I was gonna work and her name is Monica and I don't know what her last name is and I told her 9:00 and I was leaving then. I was coming back. So he could have over-heard it in the line or somethin.

Det. O'Connell: Okay, so there were customers around at that time.

Ms. Daily: Yeah, when I told the girl Monica I was leaving and coming back at 10. But, it didn't seem like

there was that many people around cause I don't broadcast that kind of stuff all the time. You know, and then I got in my car and went home and came back at ten, to finish it out.

Det. O'Connell: Did you lock the car when you left it back in the lot?

Ms. Daily: Yep, it was locked.

Det. O'Connell: Okay. That's a habit of your's so you know for sure?

Ms. Daily: Yeah. I'm positive.

Det. O'Connell: Okay, good.

Ms. Daily: Because I'm from, I moved here from Mankato, Minnesota and I lived in Minneapolis before, it's just a habit. I'm the only person that in Gunnison that probably used to do that.

Det. O'Connell: I know. I lock mine to [sic] but, same thing, I'm from the L.A. area.

Ms. Daily: And you just get used to it. Plus, knowing I was gonna get off that late. And I parked in front. I mean, I didn't park it where we usually have to park on the side. It was parked in *front* of City Market. So, I mean, it wasn't hidden, and there aren't that [p. 2] are on, in the parking lot at night. If you go by there, if you have a chance, just see how dark that parking lot is. It's ridiculous.

Det. O'Connell: Yeah. I'm gonna go to all these at night. During the times, about, after dark anyway to see what the lights are.

Ms. Daily: The lights are just outragiously [sic] bad, at City Market, still. They haven't done anything to improve that. And it pisses me off a lot.

Det. O'Connell: I don't blame you.

Ms. Daily: It really does. And it makes the customers mad and we are, they are loosing business at night. Cause I've had ladies tell me, we think you [sic] store's not even open cause your parking lot is so dark.

Det. O'Connell: Mmmmmmm. Secondly, with this I'm sure they can read the paper, if the Press is anything like it is in Durango.

Ms. Daily: So. . . .

Det. O'Connell: So of course, if especially they're dropping by to shop they don't want to put themselves in the same situation.

Ms. Daily: I get really, I have gone in there probably a couple of times to, since, you know, when I haven't been working to go shop and come out in the parking lot and I'm scared to death. But they don't, they don't ever let me walk out there by myself. But sometimes, I have, cause there's not anybody around, I don't want to be a nuisance. But you have to run to the store to get some stuff, you know, sometimes that stuff happens.

Det. O'Connell: But at the same time you feel the hairs on the back of your neck stand up and . . . .

Ms. Daily: Mmmmm, Oh? MMMMM. They will always do that probably. But so then, about midnight one of the guys came in to the store that was working, it was me and like five other guys. And ah, most of them got off

at midnight. And one of them's car, the plugs had been pulled from his car, you know, so he couldn't start it. He was out there messin around with his car until about 10 minutes before I got off at . . .

Det. O'Connell: Does that car look anything like your car?

Ms. Daily: No. It's a Bug. Blue Bug.

Det. O'Connell: Somebody pulled all the plugs on his car.

Ms. Daily: Yeah. They'd done something to it so it wouldn't start. He thought it was some girl that had worked at the store that was playin a trick on him.

[p. 3] Det. O'Connell: Which it might be but at the same time it's really interesting that it's the same night.

Ms. Daily: I can't imagine that somebody wanted, you know, the guy gets off an eight hour shift the last thing he wants is for his car not to start. But he out messin with his car until about 5-10 minutes before I had to leave. The store. And then when I left the store the one guy, Phil, walked me to my car. And I always have a habit, I can never find my keys in my purse. I, still, to this day I can't. It's always in the bottom. But, he walked me to my car just to be sure I was fine, you know, and then, he knew my car was locked so that he didn't think nothing of it. You know, and I didn't either. So I get in my car and the only thing I could think of is I went to get my cigaretts [sic] out the bottom. So I turned on the light in the car and I was reachin down trying to find my cigaretts [sic],

Det. O'Connell: In the bottom of the car?

Ms. Daily: Yeah. They were on the passenger side. I knew they had fallen when I had gone home or something. I knew they were down there. So I was gettin those out and I must have seen some motion or somethin in the back and that's when I put my hand back there like that and my hands were on his knees. The guy's knees and the light was still on all the time and I thought for some reason, that it was this guy that they'd played the trick on his car? That he was playin a trick on me. And like, "What are you doin in my car?" And then I'm looking at him and I realize I don't know who this person is. And then I'm like, "What *are* you doin in my car?" Who are you, you know, what's going on?

Det. O'Connell: Were you saying these things to him?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: I was talkin to him the whole time cause I thought it was Pat. The guy from work. It wasn't.

Det. O'Connell: Now, when you turned around and looked at him, what did he look like? Right then. What was he wearing, what did his hair look like?

Ms. Daily: He had grey sweat pants on.

Det. O'Connell: Okay.

Ms. Daily: And he had a white handkerchief over his,

Det. O'Connell: That was white!

Ms. Daily: Yeah.

[p. 4] Det. O'Connell: Like a regular linen handkerchief.

Ms. Daily: Regular. . . . handkerchief. He had on, and blue eyes.

Det. O'Connell: Dould [sic] you tell, now did he have, like a mask on and then a scarf over it? Definitely eyes.

Ms. Daily: Definitely eyes, I was looking right into his eyes.

Det. O'Connell: Okay good.

Ms. Daily: And the, he had the receeding [sic] hairline. But I can't tell if it was, I can't remember if it was straight or curly. But I know it was a receeding [sic], he had a darkish, kind of reddish kind of complexion.

Det. O'Connell: You know, like a "ruddy" kind of complexion.

Ms. Daily: Yeah.

Det. O'Connell: Did he have a lot of freckles?

Ms. Daily: Ahuh. Nothin.

Det. O'Connell: Just kind of a red tone to it.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: You know, it, it wasn't ah, it wasn't like a burn or anything, it was a red tone skin.

Det. O'Connell: Do you think it was a blush from when, from going, Oh my God, she's gonna see me. Do you think that could have been part of the look?

Ms. Daily: Yeah. He had fear in his eyes. When I saw him. But I had already locked my door and everything by the time I got in there and,

Det. O'Connell: How was he sitting in the seat, sideways or?

Ms. Daily: No. He was like, yeah, behind my seat.

Det. O'Connell: Okay, let's say this was your seat, okay, and here's the other seat.

Ms. Daily: Okay, he was crouched like this,

Det. O'Connell: Okay, so he was cross-wise of the back seat

Ms. Daily: Yeah

Det. O'Connell: And with his knees pulled up.

[p. 5] Ms. Daily: His knees, well they weren't really pulled up. Cause they weren't, they weren't even level with the seat, you know.

Det. O'Connell: Okay, and then his head was down far enough, below the back?

Ms. Daily: Yeah. Below the car door.

Det. O'Connell: Oh, that far down!

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: So that's how I know he's not that tall and can't be really that big.

Det. O'Connell: What kind of car do you have?

Ms. Daily: Honda Accord.

Det. O'Connell: Yeah, so he can't be real big.

Ms. Daily: But my seat's always pulled way up. Okay, too, so he can't be that big of a person. Like five eight I think is pushin it.

Det. O'Connell: Okay.

Ms. Daily: And I know he probably weights about, built just like the old boyfriend I had, and so I'd say he weighed about 180 cause he's kind a hefty right here.

Det. O'Connell: Kind of fat in the middle, almost like a beer belly?

Ms. Daily: Yeah, kinda. You know, but not that big of a build. He's not that big of a built guy.

Det. O'Connell: Okay, so kind of small boned?

Ms. Daily: Mmmmm.

Det. O'Connell: Okay.

Ms. Daily: But yet, you know, heavy. I mean, not a good build and he had like to me, it was like a blue wind-breaker thing on. Cause that's the noise I remember hearing when he left. Was a slash of that and I remember hearing that in the back seat.

Det. O'Connell: A nylon wind-breaker?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

[p. 6] Ms. Daily: You know, just plain.

Det. O'Connell: Now, was the hair, was the hairline receeding [sic] or thinning?

Ms. Daily: Receeding [sic].

Det. O'Connell: Okay.

Ms. Daily: It was like a high forehead.

Det. O'Connell: Okay.

Det. O'Connell: And, almost kind of a reddish tint blond. You know, not, not a white blond. You know.

Det. O'Connell: Kind of like your blond but instead of having brown tones it had reddish tones?

Ms. Daily: Kind of yeah.

Det. O'Connell: Okay.

Ms. Daily: And I'm almost positive blue eyes cause I remember lookin right into those eyes. And all blue eyes really bother me, people with blue eyes.

Det. O'Connell: Are they the icy, clear blue or a, a purply blue?

Ms. Daily: Icy.

Det. O'Connell: Almost like Husky dogs have?

Ms. Daily: Mmmmm..

Det. O'Connell: Okay.

Ms. Daily: And ah, he had a mustache. But I didn't see that.

Det. O'Connell: How could you tell he had a mustache?

Ms. Daily: I felt that.

Det. O'Connell: Oh, okay, later.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then, okay, then he, Okay when I finally realized I didn't know who he was he started yellin at me to turn off the light. You know, he yelled, turn off the damn light! turn off the damn light! You know, so I was really just shaking so I tried to turn it off, I mean. I turned it back on so I mean, so he's like getting up. Okay, but [p. 7] Phil has seen I was in my car and thought I was all right and had already gone back into the store. I was keeping on hoping that he had seen some of this and was gonna come back out. So I got the light off and he was like, get your keys in the ignition and start the car. And I said I'll take you anywhere you want to go or wherever you want to go, just don't hurt me. Okay and by this time he's got the knife up to my neck.

Det. O'Connell: Okay.

Ms. Daily: And he's sayin. Just drive.

Det. O'Connell: Now did he, he swung his feet forward now he's got them on the floor?

Ms. Daily: Yeah. He must have, yeah, cause he had the knife up to my throat before I started driving.

Det. O'Connell: Okay, did he have like, reaching from behind, did he hold on to any part of you with this hand?

Ms. Daily: Yes. He had one hand, he had my collar like this the whole time and the other hand he had the knife.

Det. O'Connell: Okay.

Ms. Daily: And he was sitting down.

Det. O'Connell: Okay, so that's in his right hand.

Ms. Daily: Yes.

Det. O'Connell: Okay.

Ms. Daily: Cause he always had ahold of my collar. I'll never forget that feeling.

Det. O'Connell: Was he pulling your hair to?

Ms. Daily: Yeah, well no, not really, I just had, had on one of those big Coat shirts that have one of those big collars.

Det. O'Connell: Yeah, yeah.

Ms. Daily: And he just like he had a lock on that,

Det. O'Connell: So he just kind of reached up under your hair and then grabbed the collar.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

[p. 8] Ms. Daily: Oh yeah, he, he did. He, like yeah. Okay, and then he had the knife and he said, just drive. And then, I have a stick shift and I was like not driving very well you know, and I'm and I explained to him, I go, I'm sorry I'm not driving very well. And, okay, then he just said, he just told me where to drive. And he just said,

just keep going straight and then we just went to that Gunnison Bank and Trust or whatever that Bank is.

Det. O'Connell: Now, when he said, just keep going straight, is, from where you were parked was it straight over to there?

Ms. Daily: No. I had to turn. I mean, just.

Det. O'Connell: So he would tell you turn left or turn right? Or?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then ah, then, okay, he took me to that parking lot and he goes, no, pull in the way back. In the dark part. So, I pulled in the way back part. And then I swore to God he said my name. I told him that that night to but I don't know. I could have swore he said "Janice".

Det. O'Connell: Mmmmmmm????

Ms. Daily: But I don't know.

Det. O'Connell: Do you wear a name tag at work?

Ms. Daily: Yeah.

Det. O'Connell: So there's a good chance that he could have.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: But then he asked me my name. He asked me about a boyfriend.

Det. O'Connell: Okay, now are you still in the car?

Ms. Daily: Yeah.

Det. O'Connell: You're still in the car and he's talking?

Ms. Daily: Ahuh. Well, I'm asking him questions. Like, what are you gonna do? You know. I mean. I guess I pretty much knew but I'm like, what are you gonna do? He's like, just shut up! He goe's [sic], do you have a boyfriend? You know, he goes, are you married? I said No. He goes, do you have a boyfriend? I said, No. I figured he was gonna know all this stuff. I mean, I don't know, I didn't wanna lie. I didn't [p. 9] I didn't want to take a chance to lie. So, then ah, he's in the back, now the whole time he won't let me look back. He, he you know, he's got ahold of me like this and he's like taking off his pants. It seems like. Cause he was doing somethin in the back. He was doing something back there.

Det. O'Connell: That was making him shift his weight around?

Ms. Daily: Yeah. Yeah. I know, I'm almost sure he was taking his pants off. But I don't know cause the whole time he was behind me and he won't let me look back. And I wasn't about to look back.

Det. O'Connell: Was he still, where's the knife at this time?

Ms. Daily: It's mostly here, but sometimes he'd take it, he's takin this hand off, you know, and doin things with it and the knife is always up front.

Det. O'Connell: Sometimes he'd take his hand off your collar.

Ms. Daily: Yeah,

Det. O'Connell: and use it to do whatever he was doing.

Ms. Daily: Yeah.

Det. O'Connell: Okay, is he still talking to you while he's shuffling his weight around?

Ms. Daily: Yeah.

Det. O'Connell: What other kinds of things, and if you can remember any quotes?

Ms. Daily: I'll never forget the one quote is, "Are you a nice girl?" "Are you gonna be a nice girl?" "Are you gonna tell anybody about this?" You know, all the time he kept saying, "Are you a nice girl?" And I mean, I'll never forget that. If anyone says I'm a nice girl I'm gonna hit um. Now, but he kept sayin that to me.

Det. O'Connell: He would say, "*Are* you a nice girl?" Or are you going to *Be* a nice girl?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And he'd say ah, let's see, what else was he sayin. Oh, he was askin me where I worked. And I said, Over at City Market. You know,

Det. O'Connell: Did it sound like he was just trying to make conversation with you?

[p. 10] Ms. Daily: Yeah.

Det. O'Connell: Because, obviously, he was watching you from.

Ms. Daily: Yeah, and I didn't tell him the other places I work because I work two jobs. And then ah, what else did he ask me? Oh, then, okay, then, okay, you know, open your door and get out.

Det. O'Connell: When he ask you your name did he ask you for your first *and* last name or just your first name?

Ms. Daily: Just ask for my first name. I never told him my last name.

Det. O'Connell: Okay.

Ms. Daily: And then ah,

Det. O'Connell: So then he told you to open the door,

Ms. Daily: Yeah, and I opened the door and I get out. And then he follows me through the front door. He doesn't go out the back. And then,

Det. O'Connell: How did he get over the seat?

Ms. Daily: It's got a, it's like, it's bucket seats.

Det. O'Connell: Okay.

Ms. Daily: So, then he leaned on the horn and I though, Oh shit! You know, I didn't do it. You know, and he's like, Shut up! And, you know, walk. And then, he had this place all mapped out where we were gonna go, it seemed like, ya know? Cause then he's like tellin me where to walk.

Det. O'Connell: So it was no accident that you just drove up there. You definitely had the idea that this was planned.

Ms. Daily: Yeah. As to where we were going. Yeah. But like in my mind I was thinkin of that Crested Butte thing, he wanted some, I don't know, I'd read in the paper that he had told someone he wanted them to drive to Crested Butte. And I did not want to get in the country with him. At all. So, then he tells me to go back by this fence. It's in the way back of the corner. It's got a bunch of trees and stuff, there's no lights back there. And, what else did he say? there's not that much talkin right now, he's just sayin, You're not goin tell anybody about this are you?

Det. O'Connell: He's still sayin that, he kept repeating that?

Ms. Daily: All the time. Kept sayin that ah, somethin like, I'll make it sound like you wanted to do this. Like it was your idea. He didn't say [p. 11] (cont'd) it like that but he said it in a way that, I'll make it sound like it was your idea. Like, okay. And then, then he ah, he had some twine or somethin, cause that's what he tied up my hands with.

Det. O'Connell: Okay, now, are you standing at this point?

Ms. Daily: No. He has me sit down.

Det. O'Connell: Okay.

Ms. Daily: I sat down facing the fence. The fence corner goes like this.

Det. O'Connell: Okay, so you're looking away from the car?

Ms. Daily: Yes.

Det. O'Connell: Okay.

Ms. Daily: And then ah, he said, he ties up my hands, with the twine, and then takes the ah, thing off of his mouth and put it around my eyes and,

Det. O'Connell: _____?

Ms. Daily: No.

Det. O'Connell: How could you tell he didn't have another handerchief [sic]? Did you sort of see him reaching for this?

Ms. Daily: Yeah. He like, you know, after he tied my hands,

Det. O'Connell: Mmmmmm.

Ms. Daily: Then he took that off. It seems like, cause he didn't have his hand on me. I'm sure it was the same one.

Det. O'Connell: Okay.

Ms. Daily: And then ah, he tied that around my eyes.

Det. O'Connell: Where was he standing. Like you're sitting there, where is he standing?

Ms. Daily: He's on his knees behind me.

Det. O'Connell: Okay.

Ms. Daily: Okay? Behind me. Okay, and I'm like this and he's behind me.

Det. O'Connell: So that's when you could see him reach around like this,

Ms. Daily: Yeah.

[p. 11] [sic] Det. O'Connell: Okay.

Ms. Daily: Okay, so then after he did that, he tied my shoes together. No, he did that after he tied my hands. Cause I know he tied my shoes together.

Det. O'Connell: Take your time.

Ms. Daily: Okay, I'm tryin to think. Okay, no, cause then (cough) okay, after he tied the handerchief [sic] on my eyes, then he, he had me lay down. That's when he took off my pants.

Det. O'Connell: Did he tell you, lie down, or did he just shove you down?

Ms. Daily: No he told me to lie down.

Det. O'Connell: Okay.

Ms. Daily: He, he wasn't real forceful. All the time, you know. I mean, he was, I was scared to say something wrong he might get mad. Cause he got mad at me in the car cause I kept the light on, I didn't mean to.

Det. O'Connell: And that's when he yelled?

Ms. Daily: Mmmmmmm.

Det. O'Connell: So he has you lie down. Oh, let's, let's talk about the cord for a minute. Could you feel what the cord might have been made out of?

Ms. Daily: It was like twine.

Det. O'Connell: Ahmmmmmm,

Ms. Daily: It was thin. I mean, it wasn't, it wasn't rope.

Det. O'Connell: Okay. Could, do you think it could have been ah, piece of leather like a leather shoe lace? Or did it feel more like woven stuff?

Ms. Daily: More like woven.

Det. O'Connell: Okay.

Ms. Daily: Pretty much. And the, then he told me to lay down. And then he ah, like he took off my shoes ___.

Det. O'Connell: What kind of shoes did you have on?

Ms. Daily: I had on tennis shoes. And ah, then he took off my pants.

Det. O'Connell: Was he rough while he was doing this?

[p. 12] Ms. Daily: Ahnnnn. Not while, in this part. And then, ahm, see this is why I don't think he had any pants on cause then, I, I'm, I'm almost sure he didn't. Cause then he started doing some stuff you know.

Det. O'Connell: Did he, now when he started doing this stuff, was, did he try and have you perform some oral sex on him first, while you were lying down?

Ms. Daily: Yes.

Det. O'Connell: Okay.

Ms. Daily: And that's when he got mad at me cause I can't do that. I, I can't, I mean I was too nervous and I was choking. You know.

Det. O'Connell: How was he doing that? Did he have like his knees on your shoulders, was that bruising your shoulders?

Ms. Daily: No, he, no, he just, he had, he was laying on top of me like that, you know, his hands kinda bein up here by the knife, cause the knife was always beside him.

Det. O'Connell: Okay, so he was supporting himself with his hands and having the rest of his body lying on you.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then he got mad at me cause I. . . . couldn't do that.

Det. O'Connell: Did he have an erection at the time he was trying to make you do that?

Ms. Daily: Yeah he did.

Det. O'Connell: Okay.

Ms. Daily: (caugh [sic]) I think yeah. He did. And I was choking. I've never been able to have oral sex. Never. So, I, like I told him, I'm sorry, I just can't.

Det. O'Connell: Okay. But did you turn your head away to be able to talk to him? Okay.

Ms. Daily: And then that kind of made him mad. And he, then he started getting kind of gruff with me.

And he, then he took his knife and ripped open my bra. My shirt was on this whole time. And he just moved my shirt up and he took his knife and ripped open my bra and he started, like having sex . . . with my chest.

Det. O'Connell: He was rubbing his penis up and down between your breasts?

Ms. Daily: Yeah.

Det. O'Connell: Okay, when he was doing that, would he like hold, squeeze your breasts . . .

[p. 13] Ms. Daily: Yeah.

Det. O'Connell: Okay. Now, where was the knife then?

Ms. Daily: He had the knife beside his hand like here, I mean, you know, like almost like here. Instead of down, you know? It was like beside his hand but not in his hand.

Det. O'Connell: Okay,

Ms. Daily: And then ahm,

Det. O'Connell: Could you tell if he ejaculated any, while doing this with your breasts?

Ms. Daily: No. He didn't.

Det. O'Connell: And was this rough now? Like I mean, was he just gently pushing them together or did he just *shove* them hard?

Ms. Daily: No, he was kind of gruff with them and he was like, talkin dirty.

Det. O'Connell: Okay, great! Some of the exact things he said because we need this on profile. If you can remember exact words and if he used dirty words what were they?

Ms. Daily: Well he was just going on and on about my chest. About how much he liked my chest. How he should.

Det. O'Connell: Now what would he say? Would he say breasts or tits or, what, how would he say it?

Ms. Daily: Breasts, he called them breasts.

Det. O'Connell: Breasts! Okay.

Ms. Daily: Never refered [sic] to them as tits. Or anything, he ah, and then like some times, like goin, Oh this feels great. And everything and then, then he moved down. Okay, cause like I didn't have no pants on.

Det. O'Connell: Right. Now when, the thing with the breasts, I still need to know, did he say, would he say things like your breasts are great or your breasts are beautiful or, did he, can you remember exactly what he said?

Ms. Daily: Well he said that, what else did he say. Somethin like, (pause) what did he say. He said I had a nice pair or something, I can't think. You know, what it was. You know. And what was it he said. It wasn't tits.

Det. O'Connell: Boobs maybe?

Ms. Daily: No, it wasn't that. I really can't think of what he said at that time.

[p. 14] Det. O'Connell: Okay, well you might think of it later. But if you can remember, please, call us back and let us know. Because that's another one of those things that's gonna, what words he uses are what he, his brain's thinking.

Ms. Daily: Well, then, then he moved down and ah, made me you know, I don't know, how to say, ah, (sigh) it's like embarassing [sic] you know, cause I didn't enjoy it at all, but like he made me act like I was, tell him I was, you know?

Det. O'Connell: Okay, tell me any of the statements or,

Ms. Daily: Okay, he kept saying, tell me how good I am. Tell me how good it makes you feel.

Det. O'Connell: Okay, and that was the words, "how good I am"?

Ms. Daily: Yeah. And tell me how good it makes you feel. So he was like having me talk to him, like oh you're so good. You know, you make me feel so good. And then he grabbed my hips and he like he was ___ to it, you know, and, it didn't last very long. You know, not very vlong [sic] at all. And then he got mad. Because, I don't know how to explain this, he made me stop, he was making me do this stuff but then he goes, stop, you gotta stop! Stop! He ejaculated.

Det. O'Connell: He's the one moving your hips and then he what, slammed them down or?

Ms. Daily: Yeah.

Det. O'Connell: Mashes you down?

Ms. Daily: He's like, stop, just stop. Cause he was going to. . . .

Det. O'Connell: He was going to come and he didn't want to.

Ms. Daily: Yeah. You know.

Det. O'Connell: Okay.

Ms. Daily: And then, then he was like ahm, he kept sayin to me, well, then when he was doing it he was like, then he started, he did say fuck a couple of times. That. . . .

Det. O'Connell: Was it like, just an expression, "Oh fuck, oh fuck" or did,

Ms. Daily: No, it was like, fuck me, like that, just a couple times. I mean, use abusive language but at times,

Det. O'Connell: When he used "fuck me", was it like he was taling [sic] to himself?

Ms. Daily: Kind of, yeah.

Det. O'Connell: Okay.

[p. 15] Ms. Daily: It wasn't yeah. The only thing he like really said to me during this time was, tell me how good I am, you know, tell me how much you like it. How good I make you feel. And everything. And then, then, he stopped, you know. That, like, don't do that anymore, he told me not do that anymore.

Det. O'Connell: It was kind of like when you stopped talking was because he was getting too much into it. To continue talking and then right after that he wanted you to stop, moving at all.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then ahm, then, then it was like over. You know, but then, okay, Then he talked.

Det. O'Connell: Okay, so then he made you, he said, stop. So then, he started moving on his own?

Ms. Daily: Yeah.

Det. O'Connell: Okay, So he's like thrusting and you're not moving.

Ms. Daily: Yeah.

Det. O'Connell: And he's not making your hips move either.

Ms. Daily: No.

Det. O'Connell: Okay.

Ms. Daily: And then, he's like ah,

Det. O'Connell: How long do you think he did the thrusting on his hown [sic]?

Ms. Daily: Not very long. Not too long.

Det. O'Connell: About 2-3 minutes or?

Ms. Daily: Yeah, that'd be about it.

Det. O'Connell: Okay.

Ms. Daily: I mean, the whole didn't even last that long, you know? I mean, it was just like, ah, I don't know. He then, he, okay, he didn't have my shoes tied together cause like, he had me, you know, move my legs _____.

Det. O'Connell: You know, did he tell you, did he, you mentioned in the report that he kind of threw your legs open or spread them kind of rough?

Ms. Daily: Yeah.

[p. 16] Det. O'Connell: Is this when he moved down?

Ms. Daily: When he moved down.

Det. O'Connell: From doing the number with your breasts. And he moved down, so at that point your feet or legs are together.

Ms. Daily: Yeah.

Det. O'Connell: Okay. And then what did he do, did he grab you by the knees or the feet or what?

Ms. Daily: No, it was like by the thighs.

Det. O'Connell: Okay.

Ms. Daily: And he moved them apart. And, then, then he just . . . started.

Det. O'Connell: Okay, now, did he bring any lubricant or did he just kind of "shove it in dry" as it were?

Ms. Daily: Yeah. No, no, there was no foreplay or nothin like that, you know.

Det. O'Connell: Then he didn't bring anything along to help, he just,

Ms. Daily: No.

Det. O'Connell: Shoved it in.

Ms. Daily: Yeah.

Det. O'Connell: On, I know that this is kind of a strange question, but for penis size, was he real small, exceptionally large, mediocre?

Ms. Daily: Probably . . . real small. I mean,

Det. O'Connell: On the small side or?

Ms. Daily: Yeah. It wasn't, I mean it didn't like really hurt me that bad, you know what I mean?

Det. O'Connell: So if it hadn't been dry it wouldn't have been so painful, right.

Ms. Daily: Yeah. Yeah.

Det. O'Connell: So it wasn't that he was exceptionally large.

Ms. Daily: No.

Det. O'Connell: But he still managed to maintain an erection during the time?

Ms. Daily: He did, well, maybe not. Cause he,

Det. O'Connell: See, I'm wondering he maybe he had it up and then lost it and he got it up again. Do you think that might have been the case?

[p. 17] Ms. Daily: Yeah. He did have the erection when he,

Det. O'Connell: When he was doing it with your breasts?

Ms. Daily: Well no, when he was doing . . . oral sex.

Det. O'Connell: Oh, okay.

Ms. Daily: And then during, I don't really know if he did or not, at that time. You know, I wasn't concentrating on, you know, I was just concentrating on him not killing me.

Det. O'Connell: Yeah, it's hard to think of details when you're scared.

Ms. Daily: And then, he did have an erection for awhile. But it wasn't very long. Down, when he was . . . .

Det. O'Connell: Actually during the intercourse?

Ms. Daily: Yeah.

Det. O'Connell: Huh!

Ms. Daily: Because, you know, the minute he made me move my hips, like, lost it, you know. I mean, probably the whole sexual act lasted five minutes. Maybe 10.

Det. O'Connell: And that's from when he was making you move and moving by himself.

Ms. Daily: Yeah. Yeah. And then ah, okay, and then after it was all done, he put my clothes back on me. He put . . .

Det. O'Connell: You're still laying there with your hands tied behind you,

Ms. Daily: Yeah, and he put my underwear on and then he put my pants on and then he put my shoes on and that's when he tied them together. Tied my shoes together.

Det. O'Connell: But he hadn't tied you, your feet prior to that time?

Ms. Daily: No.

Det. O'Connell: And he tied them together after the fact then?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: So I couldn't get up and chase him.

Det. O'Connell: Oh, okay.

Ms. Daily: And then he ah, asked me,

[p. 18] Det. O'Connell: Did he, did he tie one shoe lace to the other shoe lace, is that what he did?

Side two of tape:

Det. O'Connell: Did he point, meaning "this" Bank?

Ms. Daily: And, well no, he didn't, I don't, I don't know cause I couldn't see anything, and I said, you mean here or do you mean at home? And he goes, well either place. And I go, no. I go, I have a hundred dollars in my purse, you can have that. And ah, he went to the car then. He went back to the car. He was back at the car for bout, 5 minutes.

Det. O'Connell: So he was either going through your purse or putting on his pants, or both.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then ah, and that's why I was glad I hadn't lied to him cause he could see my name and everything on my license and stuff. And then he came

back and he said, no, if that's all your money I'm not gonna take it. And he said, don't turn around for five minutes. And he goes, don't tell anybody about this cause I'll make it sound like you wanted to do this. And he goes, just be a nice girl. And then he took off runnin behind me, back towards, like City Marker.

Det. O'Connell: Okay.

Ms. Daily: Well he'd untied me, okay? He'd taken the handerchief [sic], he'd untied my hands, but he had my feet tied together. And he said don't turn around cause I'm gonna be watchin you.

Det. O'Connell: Were you sitting then?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And he goes, don't turn around cause I'm gonna be watching, and so I didn't. And ah, said wait five minutes and then you can get in your car and go. I didn't know if he was still in the car or not. You, know,

Det. O'Connell: Good point, he was there the first time, why not now.

Ms. Daily: Yeah. And that's when I went and called my brother-in-law. So . . . .

Det. O'Connell: Can you think of, since you saw his eyes and they were those distinctive kind of icy blue, can you remember a customer coming through, with those eyes?

Ms. Daily: Not that night. It doesn't seem like, well cause, like, most the time I'm not up front. I'm one of those people who has to do everything

[p. 19] Det. O'Connell: You don't run the cash register?

Ms. Daily: No –

Det. O'Connell: The cash registers?

Ms. Daily: No. And I hadn't that time at all. And so, you know, I don't know. There's been a couple people come through that really freaked me out and I told these guys about it,

Det. O'Connell: Mmmmmmmm.

Ms. Daily: But that's been about it. I don't know.

Det. O'Connell: Receeding [sic] hair, and icy blue eyes. Can you remember if his hair was sticking down below?

Ms. Daily: Nnnnnnn . . . All I knew is that he had a mustache at the time and I guess he probably shaved it off. *If it's the same one* with the second woman.

Det. O'Connell: When, was he kissing you during the intercourse?

Ms. Daily: No.

Det. O'Connell: Did, and that's when you noticed the mustache.

Ms. Daily: Mmmm.

Det. O'Connell: Okay, did you notice any odors about him, like, body odor or cigarette smoke or alcohol?

Ms. Daily: There was no alcohol and I could not smell smoke or anything. You know, you can kind of tell, it didn't seem like he was a smoker cause he didn't have that kind of odor, on his breath.

Det. O'Connell: Okay. At the time he kissed you, did he put his tongue in your mouth?

Ms. Daily: Mmmmmm.

Det. O'Connell: Okay, did you notice anything at all, anything strange about his tongue?

Ms. Daily: Nnnnnnnn.

Det. O'Connell: Okay. He did have a mustache, could you notice if his skin was rough or if he, anything else about his skin?

Ms. Daily: I didn't have that much contact with his skin, really.

Det. O'Connell: When he kissed you would he make sure that his face didn't touch yours?

Ms. Daily: No, he kissed kind of, I forgot about that, he kissed kind of gruffly. You know?

[p. 20] Det. O'Connell: Like he was smashing your lips against your teeth, that hard?

Ms. Daily: Yeah. Kind of like, if you kiss harder then I'll kiss back, you know?

Det. O'Connell: Mmmmmm.

Ms. Daily: Like that.

Det. O'Connell: So like if he kissed harder it might make you respond?

Ms. Daily: Right.

Det. O'Connell: Okay.

Ms. Daily: There is a distinct smell that _____but it's something that only hits me every once in awhile. You know what I mean? It's weird kind of a. . . .

Det. O'Connell: Is it a food odor maybe?

Ms. Daily: No, it's kind of out-doorsy kind of, you know.

Det. O'Connell: Smoke maybe?

Ms. Daily: No. You know, how you kind of smell like you've been out-side? That, kind of, okay, kind of like that.

Det. O'Connell: Y . . . e..a..h. Is it kind of a Pine odor maybe?

Ms. Daily: No, I don't know how to explain it. It's not sweat. But, it's like when you've been outside all day, how you kind of smell.

Det. O'Connell: Mmmmmmm. Could it have been a cologne?

Ms. Daily: May be. It could have been. There was a certain smell that every once in awhile I smell it. It kind of bugs me but I can't think what it is.

Det. O'Connell: The next time you smell it concentrate, where is this coming from, what is it, why am I smelling it now, and so on. I mean, it may not even be the same thing but at least if it's close enough you can describe it maybe we can track down what it was. When

he was kissing you with his tongue, was his tongue touching your's? That you could feel? If there was anything strange about it?

No response heard.

Det. O'Connell: Out-doorsy odor. Ahm. Well the next time you hit that one, remember it, and call these guys cause that one is one that I can't figure out.

Ms. Daily: There was, I mean, there was a certain smell about him, but I don't know what it is. I've smelled it a few times since and it freaks me out but I don't know what I contribute it to. You know.

[p. 21] Det. O'Connell: Well, like I said, the next time you do, try and stop and remember what it was. During the time that you were having intercourse, did he want you to put your legs around him?

Ms. Daily: Mmmmm..

Det. O'Connell: Okay, could you tell me about that?

Ms. Daily: He wanted me to put my legs up. You know, about, middle. So that he could get . . . like more thrust_____. I don't know.

Det. O'Connell: When he brought your legs up, could you tell if he was exceptionally hairy? Did he seem to have a lot of hair on his legs?

Ms. Daily: He kind of did. He was not, I mean not massively hairy but more than the average person I'd say.

Det. O'Connell: Okay.

Ms. Daily: I hadn't thought about that.

Det. O'Connell: Now his wind-breaker, he had it on when he came with you from the car.

Ms. Daily: I don't know if he had that on, he didn't have that on either.

Det. O'Connell: When do you think he took thit [sic] off?

Ms. Daily: I think he took that off in the car to.

Det. O'Connell: So he would have gotten out of the car totally naked, do you think?

Ms. Daily: No, he had his shirt on then.

Det. O'Connell: Okay.

Ms. Daily: But it seems to me that he didn't have his on, or maybe he just took off his sweat pants and only had on his truncks [sic] or somethin.

Det. O'Connell: Can you remember, excuse me, can you remember, while you were sitting down, can you remember the sound of him taking clothes off behind you?

Ms. Daily: Nope. He took them off in the car.

Det. O'Connell: Okay.

Ms. Daily: Cause there wasn't time for him to do that, you know, he took them off in the car.

Det. O'Connell: The bandana, was there any odor to the handerchief [sic] at all? As it came past your nose, do you remember?

[p.22] Ms. Daily: Nnnnnn.

Det. O'Connell: Did it smell like starch or like laundry or anything like that?

Ms. Daily: Not that I remember. I just know it was a white one and it had like ahm, like, okay, it's not a straight white one, it had like a . . .

Det. O'Connell: Like a design woven in it?

Ms. Daily: Yeah. A square, you know, like around in a square. you know, like that, just around the edges.

Det. O'Connell: Ahuh, but it was white rather than, usually those are red or yellow or blue or something like.

Ms. Daily: This was white.

Det. O'Connell: This was definitely white. Can you remember what the pattern was that was running around the border?

Ms. Daily: It was just plain, I mean, you know how they can sometimes,

Det. O'Connell: Okay, here you go.

Ms. Daily: It was just a plain pattern. I mean, it was a men's handerchief [sic] so it wasn't lacy, lace.

Det. O'Connell: Okay.

Ms. Daily: Okay, so it was all white you know, except for like, it wasn't as much material right there, you know what I mean?

Det. O'Connell: Oh, okay.

Ms. Daily: That kind.

Det. O'Connell: The kind with the little cut out threads,

Ms. Daily: Yeah.

Det. O'Connell: So that you can see through that part.

Ms. Daily: Yeah.

Det. O'Connell: Okay. But there was not color to it.

Ms. Daily: No.

Det. O'Connell: Okay.

Ms. Daily: And then the knife to, I saw the knife.

[p. 23] Det. O'Connell: Great! Great!

Ms. Daily: I know, they have never figured out what my design on the knife is. But it's like this. Oh I made it too thick. Okay, it's just got a normal round handle, okay,

Det. O'Connell: Okay, was it,

Ms. Daily: It was, this was thick, this was thick. Okay, and then it came up like this, down like this, straight on that side, you know what I mean.

Det. O'Connell: Okay, which was the sharp edge?

Ms. Daily: Right there. This is the sharp edge.

Det. O'Connell: Okay, put me a little arrow for the sharp edge. Okay.

Ms. Daily: That's brown.

Det. O'Connell: Was it shiny wood? Did it have big rivets in it?

Ms. Daily: No. It was like wood.

Det. O'Connell: Just plain old dull wood. Without, I mean like, like the finish had worn off.

Ms. Daily: (can not hear response)

Det. O'Connell: Okay, can you remember if it had rivets in it?

Ms. Daily: Nnnnnn, you mean like, where you hold it you mean?

Det. O'Connell: Ah, no like where they bolt it together.

Ms. Daily: I don't,

Det. O'Connell: It would just be like a shiny spot either silver or brass. Like on a knife handle it will look something like _____here and

Ms. Daily: It had no handles.

Det. O'Connell: Okay, so, it will have like a spot here and a spot here, spot here. Those are rivets that are holding the other side of the handle together.

Ms. Daily: It seemed like they were black.

Det. O'Connell: Black rivets?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

[p. 24] Ms. Daily: It seems like, I'm not real.

Det. O'Connell: When did you have a chance to see the knife?

Ms. Daily: When he brought it up front. Okay,

Det. O'Connell: When the dome light was still on.

Ms. Daily: Well when, I say the knife when the dome light was on and I'm looking back at him. That's when I decided to take him seriously. You know, that this wasn't a joke. And that's when I saw the knife. He had the knife up, you know, in his hand.

Det. O'Connell: And you're sure that that's the sharp side of the knife. Not this side.

Ms. Daily: Yeah, it seems like it. I mean, I can't explain the kind of knife it was. But, no that must have been the sharp side. To be a normal knife.

Det. O'Connell: No, it might not be a normal knife so whatever you remember.

Ms. Daily: It seems like that was the sharp edge.

Det. O'Connell: Okay.

Ms. Daily: But I know that that's the way the blade was.

Det. O'Connell: Okay. For all we know he might have sharpened the back side of it.

Ms. Daily: You, know, yeah.

Det. O'Connell: So it's what you remember that we're interested in.

Ms. Daily: That seems like it was the sharp edge.

Det. O'Connell: Okay. Any thing else at all that you can remember? Cause like seeing the knife was really important.

Ms. Daily: Nnnnnn.

Det. O'Connell: Did he have any trouble putting your clothes back on you?

Ms. Daily: Mmmmmm. Well, he was kind of nervous.

Det. O'Connell: I mean it's like he, what I'm wondering is, has he put women's clothes back on them before? Was he real clumsy or was he fairly much doing pretty good?

Ms. Daily: No, he was doing pretty good.

Det. O'Connell: Okay. Did the handerchief [sic] seem like a nice one? Like fairly light weight material or was it?

[p. 25] Ms. Daily: Mmmmmm.

Det. O'Connell: Okay.

Ms. Daily: It wasn't one of those plain ugly white ones that you can use to _____all the time. You know what I mean?

Det. O'Connell: (chuckle) Yeah!

Ms. Daily: It wasn't one of those.

Det. O'Connell: Okay, so it was a nicer handerchief [sic] .

Ms. Daily: Yeah.

Det. O'Connell: Was there any impression that you had about him at all? I mean this is just a sixth sense impression, on you [sic] own, maybe no basis for it, no

evidence for it, but just something you feel. Have you gotten any of those?

Ms. Daily: What do you mean? I mean,

Det. O'Connell: Like you think this guy is the truck-driver, you think he's a Banker, you think you've seen him.

Ms. Daily: (chuckle) I think he's an auto mechanic.

Det. O'Connell: Okay, how come you get that impression?

Ms. Daily: Cause he just ah, well, no no no, I think he's an auto mechanic because everybody keeps telling me it's this one guy from Standard.

Det. O'Connell: Oh shoot!

Ms. Daily: Well no, I think he's

Det. O'Connell: Did you smell any kind of odors?

Ms. Daily: No. To me he seemed like he was, okay, he just seemed like he was somebody that didn't have a car, for some reason, I felt that, because he was walkin around, you know, so much and everything.

Det. O'Connell: Okay, good!

Ms. Daily: And that he was a,

Det. O'Connell: You mean by walking . . . .

Ms. Daily: I was thinking like he didn't have a job. He was just kind of like "in town". I know that doesn't help you at all but,

Det. O'Connell: No, no you never know this stuff may click through somewhere along the line.

[p. 26] Ms. Daily: He just, he didn't seem like he was, I don't know.

Det. O'Connell: This ah, you say, "cause he walks around a lot" did you say he walks around a lot because he seemed to know the area so well?

Ms. Daily: Yeah. Plus he had sweat pants on.

Det. O'Connell: Like a jogger maybe.

Ms. Daily: Yeah.

Det. O'Connell: Can you remember his shoes at all?

Ms. Daily: Nnnnnnn. I know they were tennis shoes.

Det. O'Connell: Okay.

Ms. Daily: That's it. That's it. I wished I could have seen more.

Det. O'Connell: I think you're doing great for what little bit of looking in the back seat. And that wasn't much time. Are you having nightmares with this?

Ms. Daily: Yeah.

Det. O'Connell: Okay, that [sic] perfectly normal. Your subconscious has got a lot more of this down than your consious [sic] does and when you're dreaming your subconsious [sic] is what's able to bring this stuff up.

Ms. Daily: You know, in my dreams I know the person.

Det. O'Connell: Who, who is it in your dreams?

Ms. Daily: Well in my dreams it's different people each person but I know the person. And Patsy seemed to think that could mean that I do know this person but . . .

Det. O'Connell: But you just haven't focused on the name.

Ms. Daily: But I just don't know him.

Det. O'Connell: I..personally for my own, I think that since you were working on the job, that is highly visible to the public, that yeah, you're going to say one of these times, Oh my God, that's the guy that asked me for the price on the canned yams or that's the guy that asked me for where the such and such.

Ms. Daily: Yeah.

Det. O'Connell: Or what isle [sic] is the frozen foods? And, yeah, your subconscious might be trying to open it up.

Ms. Daily: And that's what really scares me cause I've drempt [sic] that, like I've drempt [sic] that it's my manager at the store, which I know it's not but [p. 27] in my dreams it's you know, or somebody that I've been waitin on out at Tomichi or something but I know it's not these two people but in my dream I know who it is.

Det. O'Connell: It could well be that you will eventually recognize this guy.

Ms. Daily: Well there is one person that gave, I've gave the name to the Police and stuff. It just freaked me out one day when he came in cause I know him, his girlfriend is one of the people I told I was working that night, you know, and,

Det. O'Connell: Does he have receeding [sic] blond hair?

Ms. Daily: Yep.

Det. O'Connell: And the icy blue eyes?

Ms. Daily: Yep. And the build. And everything. And..

Det. O'Connell: You could be right.

Ms. Daily: But it, I mean it botheres [sic] me but I can't even talk to this person anymore. You know.

Det. O'Connell: Yeah. Well that's, even if it isn't him I'm sure he's gonna understand. He's too close to . . .

Ms. Daily: Yeah.

Det. O'Connell: To the real thing, even if it isn't him.

Ms. Daily: _____. I can't pay attention to that.

Det. O'Connell: Well now these dreams that you've got, any, they might trigger a memory of something else like I ask you if his legs were hairy and you said, Oh yeah. So these dreams or flash-backs that you might be getting, may remind you of some other small detail. And PLEASE call back, which, I think you're working with a different Detective, Keith? Is the one you're working with.

Ms. Daily: Yeah.

Det. O'Connell: Call Keith back and, even if he isn't here, leave a message, make sure he gets these little bits and pieces because it's like puttin a jigsaw puzzle

together, nobody walks in with the whole jigsaw puzzle and hands it to us. Each one is gonna come in with little pieces of it. And even if it's something that sounds real irrelevant, like a remark he made or, or maybe he looks off to the west and says, Oh so and so's lights are out tonight, anything, just any little thing.

Ms. Daily: Well, like that other girl, that he got and stuff, was he more brutal or anything?

[p. 28] Det. O'Connell: No. No, there's a lot of similarities. A lot of similarities.

Ms. Daily: See, I just can't imagine why, what, what he's doing. I'm just,

Det. O'Connell: I wish I could.

Ms. Daily: You know,

Det. O'Connell: I wish I could do that, to.

Ms. Daily: Cause the only thing I want to ask him when he gets caught, and I do want to ask him this, cause it'll bug me the rest of my life. Is, why? Why me, why did you pick me?

Det. O'Connell: It could be.

Ms. Daily: That's all I want to know.

Det. O'Connell: It could be general description. That's the ONE thing that we've got going, so far, is general description. And that could be all there is to it.

Ms. Daily: Yeah. I don't know.

Det. O'Connell: Well, if anything clicks through, or somebody clicks through or a face hits you, but what

you've given us is great. I mean the receeding [sic] hair and the icy blue eyes.

Ms. Daily: It's not much.

Det. O'Connell: And the slightly reddish tint to the hair. You, you're doing great.

Ms. Daily: I don't know. They haven't caught him so I'm not doin that good.

Det. O'Connell: Well, he's no dummy, he's been clever in what he's doing. Like not letting you see him and unfortunately, since we have the ability to see, we let a lot of our other capabilities slip by. We don't pay so much attention to what we hear, what we smell and what feel. So once you deprive someone of their sight, he's got a real advantage.

Ms. Daily: I guess. But I tried to get picked up on the way home. You know what I mean. Like I went 90 miles an hour cause I didn't want to go to the Police and, cause I was really scared cause he said, what did he say, he told me not to go to the Police cause, well because he would make it sound like I,

Det. O'Connell: Like the whole thing was your idea.

Ms. Daily: And also, he didn't say he'd come and get me, but it was like inferred the fact that, you know, like he knew where I worked.

Det. O'Connell: Well you know that already.

[p. 29] Ms. Daily: Yeah.

Det. O'Connell: Okay. You could believe it for sure.

Ms. Daily: Yeah. I know, _____ a lot of stuff cause it's been four months.

Det. O'Connell: Well make notes when you remember something. Put it in a note in your purse. I mean, I can't even remember everything I want to tell my mother on the telephone so I start with the list. So just make little one or two or three word notes to yourself and then you can, when you get in here and talk to Keith then you can start elaborating on what those few words remind you of. And also, once you start using that part of your memory, it gets used more, then more stuff will start coming through.

Ms. Daily: Well I was gonna go to a hypnotist and like try to have them draw a picture of what I did see cause subconsciously you kind of block out things sometimes,

Det. O'Connell: Well check with Keith cause sometimes testimony that was gained under hynosis [sic],

Ms. Daily: They say they can't do that.

Det. O'Connell: Right. That is not admissible in Court so we, even though it might help us catch the guy, we'd end up not being able to prosecute him and that would be just as frustrating.

Ms. Daily: Well, Okay, if they do catch him, like they were sayin, that maybe they will get him on one count or try to get all of them or what, what?

Det. O'Connell: Well if we can put these little tidbits together that match, that we can tie them together, and we can. Let's say that we can get him on your's but we

can't get him on the others, then if we can show the similarities on your's then we can tie those others in.

Ms. Daily: MMMMM.

Det. O'Connell: So that's why we are SO desperate to get exactly what he said, exactly what he did, how rough, on and on.

Ms. Daily: Yeah.

Det. O'Connell: But with you, the only thing that made him mad was when you didn't get the dome light off, right away.

Ms. Daily: And when I couldn't do oral sex.

Det. O'Connell: But other than that he wasn't mad or real rough.

Ms. Daily: No.

Det. O'Connell: Did he try to perform oral sex on you?

Ms. Daily: No.

[p. 30] Det. O'Connell: Okay. Well, I can't think of anything else right now. But like I said, if you do, cause something else is lible [sic] to come up. On, on with, on your something, at first they'll be just small things and then it'll be more of them. And even if you can't remember. God did I tell them that or not, call in and tell them again. We'd rather hear it twice than not at all.

Ms. Daily: Yeah. I know I just feel like I don't want them to think I'm little paranoid freak that keeps calling them. They, ok, this is . . . . ya know.

Det. O'Connell: Well there's a difference if you keep calling, have you caught him, have you caught him, I'm having nighmares [sic], that's one thing. Where if you call them and say, Hey I think I remember one more thing about such and such. That is helpful, that's definitely helpful. The other one, yeah, sounds a little paranoid but on the other hand you've got a right to be scared. You're still don't know who he is.

Ms. Daily: No.

Det. O'Connell: And I'm glad to hear, really glad to hear that you've got a counselor cause that will help you to.

Ms. Daily: Well if he just does it one more time I have to leave, I can't take it any more.

Det. O'Connell: Well, if you DO leave, please keep Keith informed of where you went.

Ms. Daily: Yeah.

Det. O'Connell: Cause he'll keep it away from the Press, keep it away from everybody but at the same time if we do happen to nail this guy then we can bring you back with the possibility of tying him in.

Ms. Daily: Yeah. Cause that's the only thing that really bothers me. I can read about rapes and everything like that and it doesn't bother me but to know the same guy is out raping other women, bothers me.

Det. O'Connell: Well that's why I appreciate you coming in and going through all of this, which I know has got to be very unpleasant for you. But the information,

that's exactly what we're trying to do there. Is this guy, catch him somehwere [sic] else.

Ms. Daily: Well, he's kind of scary now that he's goin into homes.

Det. O'Connell: Yeah.

Ms. Daily: That's just too much.

End of tape.

Transcribed by: Shirley A. Spitzmiller
Gunnison Police Dept.

APPENDIX 2

IN THE COUNTY COURT
IN AND FOR THE COUNTY OF GUNNISON
AND STATE OF COLORADO
Action No.

THE PEOPLE OF THE STATE OF COLORADO CONCERNING JAMES A. BRUNING	)))))	AFFIDAVIT FOR ORDER FOR NONTESTIMONIAL IDENTIFICATION

I, Detective Keith Robinson, being First duly sworn, upon my oath state that I have reason to believe:

(1) There is probable cause to believe an offense has been committed, Sexual Assault in the first degree, C.R.S. 1973, 18-3-402 (F-2), in Gunnison County, Colorado on June 17, 1986 at approximately 1 AM as Janice Dailey was leaving her place of employment, City Market, which is located in the City and County of Gunnison, Ms. Dailey entered her locked maroon Honda Accord, and while sitting on the driver's seat she turned on the car's dome light and discovered a male subject in the back seat. Ms. Dailey had an opportunity to observe the subject closely. The subject threatened Ms. Dailey with a knife, ordered her to turn off the light, and ordered her to drive to a nearby bank parking lot where he ordered her out of the car and did sexually assault her, threatening her with a knife. During this attack he did blindfold her, and did bind her wrists. He ordered her to "tell me that you like it", also questioning her about boyfriends, and admiring her body. After the assault, Ms. Dailey contacted the

police, reporting the crime and describing the perpetrator as a white male in his twenties having receding brownish-blond hair, blue eyes, and wearing a blue nylon windbreaker and gray sweatpants.

(2) On or about June 25, 1986 Ms. Dailey was working at City Market, when she observed a party known to her as "Jim" enter City Market. Ms. Dailey greeted him and observed he quickly turned away from her without responding. She then noticed that he was wearing a blue nylon windbreaker and gray sweatpants. She also noticed this person had identical hair color and style and eyes as the person who had sexually assaulted her. Ms. Dailey reported that at this time, she "knew it was him", meaning the person who had sexually assaulted her.

(3) Ms. Dailey reported that "Jim" is the boyfriend of Monica Gustafson, who she is acquainted with, and has met "Jim" on three occasions socially and was told that he worked at AJ Upholstery in Gunnison.

(4) On 09-05-86, Susan LeHardy reported that at approximately 12:30 AM, as she slept on her sofa, a male party unknown to her entered her residence, 505 West Virginia, which was then and is now located in the City and County of Gunnison, and sexually assaulted her at knifepoint. During this assault, in which the victim was blindfolded and bound at the wrists, the suspect instructed her to say to him "tell me you want me to fuck you", and also questioned her about her boyfriend, and admired her body. In this attack, the knife was described as a utility knife.

(5) On 10-24-86, your affiant met with victim, Janice Dailey, who reported that she had been reluctant to come

forward and inform the police about her identification of the suspect because Monica is a friend. Through investigation, your affiant learned that "Jim", the boyfriend of Monica Gustafson, is James A. Bruning, DOB 08-03-52, one of the owners of AJ's Upholstery. Your affiant knows that linoleum knives and utility knives are common tools in the upholstery trade.

(6) With the above listed information, your affiant believes that there are reasonable grounds to suspect that James A. Bruning committed these offenses.

(7) Serological examination of blood and saliva samples can establish a relationship to the semen samples collected in the investigation. The victims can identify the voice of the perpetrator. Hair samples can be compared to hair samples collected at the scenes of the crimes. One victim reported an anomaly on the end of the suspect's tongue, and one victim can identify the facial feature of the suspect. Fingerprints can be compared to the latent prints collected at the scene, and used to identify the person.

(8) The results of the following specific non-testimonial identification procedures:

(a) Blood sample;

(b) Saliva sample;

(c) Voice sample;

(d) Hair sample;

(e) Photographs of person (including tongue); and

(f) Fingerprints

will be of material aid in determining whether the person named in this affidavit committed the offense.

The undersigned affiant hereby requests that a non-testimonial identification order in accordance with the grounds and facts herein set forth.

Dated this 24th day of October, 1986.

/s/ Keith Robinson
Affiant

Subscribed and sworn to before me this 24th day of October, 1986.

/s/ A. Reese
County Court Judge

APPENDIX 3

COUNTY COURT, COUNTY OF GUNNISON, STATE OF COLORADO

CASE NUMBER

AFFIDAVIT

THE PEOPLE OF THE STATE OF COLORADO,

vs.

JAMES ALLEN BRUNING, Defendant.

In support of a request for the issuance of a warrant for the arrest of JAMES ALLEN BRUNING, the undersigned affiant, being first duly sworn, deposes and says:

1. I am a police officer in and for the City of Gunnison, Colorado and as such have the responsibility for investigation of crimes therein.

2. On June 17, 1986 Janice Dailey reported to Officer Keehne of the Gunnison Police Department that she had been raped. Ms. Dailey reported to Officer Keehne that on June 17, 1986 at approximately 1:00 AM she left work at City Market, located at 400 West Virginia Avenue, Gunnison, Gunnison County, Colorado, and got into her car which was parked in the City Market parking lot. Ms. Dailey stated that when she got into her car she turned on the dome light and discovered a person in the rear seat. She described the person as a white male, slim to medium build, average height, with straight blond hair, mustache, and sweat pants. She reported that the subject threatened her with a knife, ordered her to turn off the light, and directed her to drive to Columbia Savings and

Loan, located at 200 North Spruce Street, Gunnison, Gunnison County, Colorado, where he ordered her out of the car and to a nearby dark area where he forced her to engage in sexual intercourse with him.

2. [sic] In subsequent interviews with Det. Locke, Gunnison Police Department, and Det. O'Connell, Durango Police Department, Janice Dailey described the suspect as having blond hair, receding or thinning in the front, blue eyes, a mustache, a reddish complexion, and wearing a blue nylon windbreaker-type jacket, gray sweat pants, and a white handkerchief over his mouth and nose. She also reported that the suspect had an unusual odor about him, kind of outdoorsy, and that he had hairy legs.

3. In an interview with Det. Robinson, on 10-24-86 Gunnison Police Department, following up on earlier remarks made by Ms. Dailey, Ms. Dailey stated she had seen the person who sexually assaulted her several days later while she was working in City Market. She reported that "Jim", the boyfriend of Monica Gustafson, an acquaintance, had entered the store and that when she greeted him he looked away without responding. She then noticed that he was wearing a blue nylon windbreaker, gray sweat pants, and that he had blond hair that was receding and blue eyes. She reported that she then suddenly realized that he was the person who sexually assaulted her on June 17, 1986. She reported that she immediately became very excited and unable to continue work, calling for someone to take her place for the remainder of the day.

4. Janice Dailey reported further that she recalled that Monica Gustafson had been in City Market the evening before the assault and that Ms. Gustafson was the only person other than store employees she told about working late that night. Ms. Dailey stated that "Jim" was Ms. Gustafson's boyfriend and that he worked at AJ's Upholstery. She also advised that Ms. Gustafson works for Western State College.

5. Sgt. Ferguson, Gunnison Police Department, contacted Robert Goodnough, Western State College Business Office, and asked if he was acquainted with Monica Gustafson and if he knew her boyfriend. Mr. Goodnough advised he knew Ms. Gustafson and called back to report that her boyfriend was Jim Bruning who owns AJ's Upholstery. Police Department records revealed that James A. Bruning is a co-owner of AJ's Upholstery.

6. On September 5, 1986 Susan LeHardy reported to Off. Ryan, Gunnison Police Department, that she had been sexually assaulted in her residence at 505 West Virginia Avenue, Gunnison, Gunnison County, Colorado. Ms. Lehardy reported that she had been asleep in her house at approximately 12:30 AM when she was attacked by a male subject who held a knife to her throat, blindfolded her, and forced her to engage in sexual intercourse with him.

7. In subsequent interviews with Off. Ryan and Det. O'Connell Ms. LeHardy described the suspect as having hairy legs, an unusual odor about his person, and having a very distinctive feature or scar on his tongue. She also reported that she believed he was wearing a nylon windbreaker type jacket, possibly velcro tennis shoes, and

she noticed that he carefully avoided touching her face with his, other than mouth to mouth contact.

8. On October 24, 1986 Det. Robinson requested and received an order for non-testimonial identification pursuant to Rule 41.1 of the Colorado Rules of Criminal Procedure ordering James Allen Bruning to provide blood, saliva, and hair specimens, fingerprints, to allow photographs of his person and his tongue, and to permit a recording of his voice. The order was carried out on October 27, 1986 with the specified identification material collected by the appropriate authority.

9. Sgt. Ferguson observed an unusual feature, possibly a scar, on Mr. Bruning's tongue which appear in the photographs taken by him. Off. Ryan transported the blood and saliva specimens to the Colorado Bureau of Investigation laboratory for examination. On October 29, 1986 lab examiner Cathy Baker reported by telephone that James A. Bruning could not be excluded as a suspect in the above described sexual assaults based upon her serological examination. Other laboratory examinations are pending.

10. I am not aware of any other facts which would tend to exculpate James Allen Bruning.

/s/ J. Steward Ferguson
Affiant

Subscribed and sworn to before me this 28th day of October 1986.

/s/ A. Reese
JUDGE

I have read the foregoing affidavit, and I find that there is probable cause to issue a warrant for the arrest of James Allen Bruning on the charges of Sexual Assault in the First Degree, Second Degree Kidnapping, First Degree Sexual Assault, and First Degree Burglary.

/s/ A. Reese
JUDGE

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1600

JAMES BRUNING,

Plaintiff,

vs.

REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District and JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District, DISTRICT ATTORNEYS OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT, FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department, CITY OF GUNNISON POLICE DEPARTMENT, JAMES ROBERT KEEHNE, RUSSELL LOCKE, ROBERT G. RYAN, KEITH ROBINSON, and J. STEWARD FERGUSON,

Defendants.

AFFIDAVIT OF PAT DELANEY

State of Colorado)
) ss.
County of Otero)

I, Pat Delaney, state under oath as follows:

1. I am currently a Chief Deputy District Attorney in the Sixteenth Judicial District. I have been a Prosecuting Attorney for almost eleven years.

2. I was an Assistant District Attorney for the Seventh Judicial District, which includes Gunnison, Colorado, from March, 1985 to March 1987.

3. On December 8, 1986, I was advised by Reid Pixler, the District Attorney for the Seventh Judicial District, that I was to assist Joseph S. Pacyga, a young deputy district attorney, in handling a preliminary hearing in the criminal case of *People of The State of Colorado vs. James Allen Bruning*, case number 86F. Mr. Bruning had been charged with committing two sexual assaults, one on Janice Dailey on June 17, 1986.

4. On the evening of December 10, 1986, I reviewed the file in preparation for the preliminary hearing which was scheduled for December 11, 1986. The file was in an extremely disorganized condition. I spent most of this time trying to organize it.

5. On December 11, 1986, I discovered that there were a number of materials that were not included in the "file" that I had been provided by Mr. Pixler. Specifically, I determined that a number of Colorado Bureau of Investigation laboratory reports and analyses of evidence were not included in this file. At that time, I spoke with Deputy District Attorney Pacyga and advised him that he would have to gather all of the material related to the case and provide it to defense counsel.

6. On December 11, 1986, Attorney Michael Stern, who was representing the victim Janice Dailey, approached me and stated "Pat, is there anything we can do about this?" Mr. Stern indicated to me that statements had been attributed to his client, Janice Dailey, that were not true. Mr. Stern indicated that these statements appeared in police affidavits. Mr. Stern said that these statements indicated that Janice Dailey had positively identified James Bruning as the rapist. Mr. Stern again

indicated that was not true. Mr. Stern advised me that at his insistence, a meeting was scheduled between Janice Dailey and himself and Mr. Pixler and Mr. Pacyga. It is my understanding that that meeting took place on October 30, 1986. Mr. Stern told me he had brought the discrepancies to the attention of Reid Pixler, Joseph Pacyga, and J. Steward Ferguson, the Gunnison police officer primarily responsible for the investigation of these crimes. Mr. Stern advised me that Janice Dailey had disavowed the statements in the affidavits in the presence of Mr. Pixler and Mr. Pacyga. This was the first time that I had been aware that there was any question concerning the veracity of the affidavits.

7. It was the routine procedure in the District Attorney's Office that one of the lawyers draft the affidavits. The affidavits filed in the Bruning case would probably have been typed in the District Attorney's Office. It was also the responsibility of a lawyer in the District Attorney's to review the underlying factual basis for the affidavits. Ninety-five percent of the affidavits that I was aware of were drafted by lawyers in the District Attorney's Office of the Seventh Judicial District. A typical procedure was that the police officer would bring the district attorney a report and the district attorney would then prepare the affidavit. I believe that Mr. Pacyga indicated to me that he had drafted the affidavits in the Bruning case.

8. At the December 11, 1986 preliminary hearing, I determined that the case was a house of cards built completely on the foundation of a positive identification by Janice Dailey. Without that identification, I felt the

case had no merit. It had become apparent that that identification was not going to come about.

9. On December 11, 1986, I spoke with J. Steward Ferguson. This conversation took place after the first day of the preliminary hearing. During this conversation, Officer Ferguson indicated to me that he believed that the case should be dismissed and that he anticipated a civil lawsuit as a result of the case.

10. I called a meeting for December 16, 1986 in which I requested the presence of Mr. Pixler, Mr. Pacyga and Officer Ferguson. At that meeting, I recommended that the case be dropped. I made that recommendation on three bases. First, that even in light of the cursory standard to establish probable cause, I did not believe we had sufficient evidence to establish probable cause at the preliminary hearing (even under Judge Reese's notoriously low standard for probable cause). Secondly, even if we were to fortuitously succeed in establishing probable cause, after hearing the evidence I believed there was a substantial possibility that James Bruning was not the rapist. Thirdly, I suggested to Mr. Pixler that the case was similar to the *Higgs* case in that we were subjecting ourselves to the possibility of a strong civil suit. I suggested that we dismiss the case at that time in an attempt to minimize our civil liability exposure. Notwithstanding my previous discussion with Officer Ferguson on December 11, 1986, at this meeting, Officer Ferguson advised Mr. Pixler by telephone that in his opinion we should go through with this case and follow it through to the bitter end. I later confronted Officer Ferguson and asked him why he had told me one thing on December 11, 1986 and

Mr. Pixler another on December 16, 1986. Officer Ferguson responded that his supervisor, Police Chief Yates, had advised him that the suit should be pursued in order to minimize exposure to civil liability. During this meeting on December 16, 1986, Mr. Pixler determined that the prosecution of this action would continue through preliminary hearing, contrary to my advice.

11. At the preliminary hearing of January 22, 1987, I discovered for the first time that Officer J. Steward Ferguson had not provided the District Attorney's Office with any exculpatory material concerning the investigation of James Bruning.

12. In my opinion, as an experienced prosecutor, I did not feel that there was sufficient evidence to bind the case over for trial. Moreover, had the affidavits of the police officer properly reflected the nature and extent of Janice Dailey's testimony, I would never have filed this case.

13. It is my opinion that one of the central reasons that the case was not dismissed following the first preliminary hearing was due to political considerations, i.e., the District Attorney's Office and the police department would have been subjected to public criticism in the event the case was dismissed at that time.

14. As an experienced prosecutor, I basically work under a presumption of guilt. The Bruning case is the only time I can recall sitting in a courtroom listening to a case and suddenly realizing that "We may have the wrong guy." Not only did we not have enough evidence to convict beyond a reasonable doubt, I personally had a reasonable doubt that Mr. Bruning was guilty.

Further the affiant sayeth not.

/s/ Patrick Delaney
Pat Delaney

Subscribed and sworn to before me this 9th day of November, 1988.

My commission expires: My Commission Expires Aug. 19, 1990

/s/ Catherine Irene Miller
Notary Public

Otero County Courthouse
LaJunta, Colorado 81050
Address

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1600

JAMES BRUNING,

Plaintiff,

vs.

REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District and JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District, DISTRICT ATTORNEYS OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT, FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department, CITY OF GUNNISON POLICE DEPARTMENT, JAMES ROBERT KEEHNE, RUSSELL LOCKE, ROBERT G. RYAN, KEITH ROBINSON, and J. STEWARD FERGUSON,

Defendants.

AFFIDAVIT OF RAND B. HENDRICKSON

State of Colorado)
) ss.
County of Jefferson)

I, Rand B. Hendrickson, state under oath as follows:

1. I am formerly the Chief Investigator of the District Attorneys Office for the Second Judicial District of the State of Colorado. Prior to my appointment as Chief Investigator, I served as a police officer for the City and

County of Denver and my various assignments included an assignment with the Sex Offense Unit of the Denver Police Department.

2. In my career as a Police Officer, I have been responsible for or participated in the investigation of over 2,000 complaints assigned to the Sex Offense Unit of the Denver Police Department. In my capacity as a Police Officer, I have drafted numerous, but in no event, less than 100 affidavits in support of: arrest warrants, search warrants and orders for nontestimonial identification. I have been qualified in the Courts of Colorado as an expert while in law enforcement and since leaving law enforcement in the field of investigative procedure, specifically procedures relating to the investigation of sexual offenses.

3. In January of 1988, I was contacted by Mr. Daniel Reilly, Attorney at Law, and presented, then and subsequently, with hundreds of pages of discovery provided by the District Attorney and law enforcement in the Seventh Judicial District and preliminary hearing transcripts, depositions and deposition summaries.

4. I was subsequently requested to review the affidavit in support of the issuance of an arrest warrant for James Allen Bruning and render an opinion based upon my background, training and experience in the field of law enforcement as to whether or not the information contained therein, constituted probable cause from the vantage point of what a reasonable police officer would know and understand probable cause to be. Relying solely on the four corners of the affidavit to make this determination and relying upon the information therein

as being truthful or at least honestly believed by the affiant at the time of the signing of the affidavit and considering it in the light most favorable to law enforcement, it is my opinion that there does exist sufficient information within the affidavit to support the issuance of an arrest warrant.

5. However, the only material evidence in the affidavit linking James Allen Bruning to the offenses enumerated in the affidavit is the alleged identification of Bruning by one of the victims, Janice Dailey. Without this alleged identification, the four corners of the affidavit would not support a finding of probable cause for the arrest of James Allen Bruning.

6. The probable cause contained in the affidavit rests squarely on the identification by Janice Dailey of James Allen Bruning as being the person who assaulted her. However, this identification was reportedly made on or about June 25, 1986 at the Gunnison Police Department, no record of any sort was made of this alleged identification until October 24, 1986 at which time officers of the Gunnison Police Department were in the process of preparing affidavits for nontestimonial identification and affidavits in support of a search warrant. It was during this process that the first reference was made of the alleged identification of Bruning by Dailey.

7. The affidavit also seems to ignore the fact that Janice Dailey was interviewed in depth on October 7, 1986 by Sharon O'Connell of the Durango Police Department and that interview was tape recorded and transcribed. In that interview, Dailey stated "There's been a couple of people come through (referring to her place of

employment) that really freaked me out . . . ", she further went on to say very specifically that " . . . I just don't know him (referring to her assailant)".

8. Considering the fact that the alleged identification of Bruning, by Dailey, was never recorded and that the subsequent interview of Dailey by Detective O'Connell which was recorded and specifically asserts her inability to make any identification and Dailey's denial that she ever positively identified Bruning as her assailant, casts real doubt as to the veracity of the statement by officers that Janice Dailey made a positive identification of James Allen Bruning, on or about June 25, 1986. If in fact an identification had been made at that time the failure of police officers to record and act on it would constitute a degree of incompentance [sic] that I have rarely if ever seen in my experiences in professional law enforcement.

9. Considering therefore the unbelievability of the alleged identification made on June 25th, coupling it with the statements which are totally in opposition to that identification contained in the transcript of Janice Dailey on October 7th. It would in my opinion lead a [sic] objective and reasonable person to conclude that the report authored by Officer Robinson on October 24, 1986 to be little more than a transparent attempt to manufacture necessary information to be included in an affidavit so that such affidavit would reach a level of probable cause necessary to support the issuance of an arrest warrant.

10. It is therefore my opinion that the information relied upon by the affiant in the preparation of the

affidavit for issuance of an arrest warrant was so obviously contraindicated as to the positive identification of Bruning by Dailey, that to include it in the affidavit without qualification or explanation constitutes a deviation from what an objective and reasonable police officer would consider appropriate in like circumstances.

Further the affiant sayeth not.

/s/ Rand B. Hendrickson
Rand B. Hendrickson

Subscribed and sworn to before me this 10th day of November, 1988.

My commission expires: My Commission Expires 09-30-91

/s/ Erika Swanson
Notary Public

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